

TRW

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VIA EXPRESS MAIL

February 5, 2007

Commissioner for Trademarks
PO Box 1451
Alexandria, VA 22313-1451

Re: Testimony Deposition of Jeffrey Creech
The Mentholatum Company v. Therox, Inc.
Opposition No.: 91/160,810
Mark Opposed: OXIUM

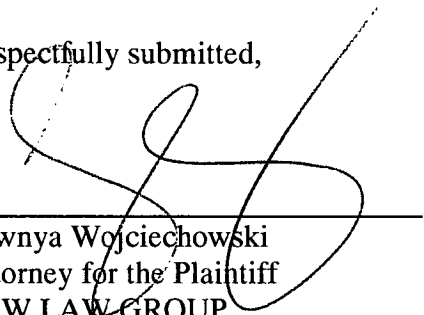
Dear Sir or Madame:

Pursuant to Trademark Rule No. 2.125, enclosed here with is the testimony deposition of Jeffrey Creech taken on December 19, 2006 on behalf of Plaintiff, Therox, Inc.

The Board will note that the testimony deposition of Jeffrey Creech, consisting of a non-confidential portion of the deposition, together with a confidential portion of such deposition at Pages 57 to 58. The confidential portion is submitted in a separate envelope clearly marked "Confidential". The Trademark Trial and Appeal Board is respectfully requested to treat the confidential portion of the transcript as confidential, and the Board is requested to keep this confidential portion separate and apart from the non-confidential transcript portion so that the confidential portion is kept under seal and is only available to the people described in the entered Protective Order as having access to material designated "Confidential".

Respectfully submitted,

By:



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02-06-2007

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #1

WITNESS SIGNATURE CERTIFICATION

I, JEFFREY CREECH, the witness whose testimony appears hereinbefore, do hereby certify and sign my name saying that I have read my foregoing testimony of the official transcript of proceedings in this action, and that I agree with the content and accuracy of said testimony.

IN WITNESS WHEREOF, I have hereunto subscribed my name.

Jeffrey Creech 2/1/07
SIGNATURE OF WITNESS DATE

STATE OF CALIFORNIA

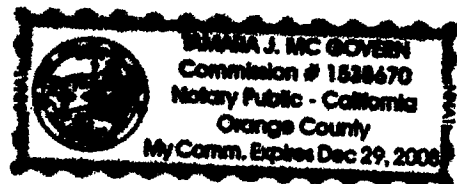
} ss.

COUNTY OF ORANGE

On February 1, 2007, before me, Tamara J. McGovern, Notary Public, personally appeared Jeffrey Creech personally known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

Tamara J. McGovern



STATE OF CALIFORNIA)

: SS.

COUNTY OF ORANGE)

I WISH TO MAKE THE FOLLOWING CHANGES, FOR THE
FOLLOWING REASONS:

PAGE	LINE	CHANGE:	<u>DELETE WORD "MANAGER"</u>
8	8	REASON:	<u>TRANSCRIPTION ERROR</u>
29	16	CHANGE:	<u>change "licensed" to "license"</u>
		REASON:	<u>TRANSCRIPTION ERROR</u>
41	7	CHANGE:	<u>CHANGE "45" TO "\$45"</u>
		REASON:	<u>TRANSCRIPTION ERROR</u>
54	23	CHANGE:	<u>DELETE WORD "ACTIVITY"</u>
		REASON:	<u>TRANSCRIPTION ERROR</u>

CHANGE: _____

REASON: _____

(WITNESS SIGNATURE)

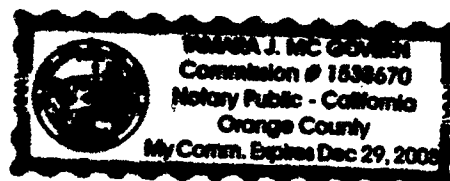
Jeffrey Creech 2/1/07

SUBSCRIBED AND SWORN TO BEFORE ME THIS

1st DAY OF February, 2007. (by Jeffrey Creech)

Yamasaaf M. Havern

NOTARY PUBLIC



PROOF OF SERVICE


I am employed in the County of Orange; I am over the age of eighteen years and not a party to the within entitled action; my business address is TRW Law Group, 19900 MacArthur Boulevard, Suite 1150, Irvine, California 92612-8433.

On January 30, 2007, I served the following document(s) described as the Errata Sheets for the **TESTIMONY DEPOSITION OF JEFFREY CREECH** to the interested party in this action by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

Leigh Ann Lindquist
Attorney for Opposer
SUGHRUE MION, PLLC
2100 Pennsylvania Avenue, N.W.
Washington, D.C. 20037-3202

- X **BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Costa Mesa, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- ☐ **BY OVERNIGHT DELIVERY:** I served such envelope or package to be delivered on the same day to an authorized courier or driver authorized by the overnight service carrier to receive documents, in an envelope or package designated by the overnight service carrier.
- ☐ **BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the office of the addressee(s).
- ☐ **STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
- X **FEDERAL:** I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 5, 2007, at Irvine, California.


Diane Magaletta-Barnes

TRADEMARK TRIAL AND APPEAL BOARD

MENTHOLATUM COMPANY,

Opposer,

vs.

THEROX, INC.,

Applicant.

CERTIFIED COPY

Opposition No. 91160810

TESTIMONY DEPOSITION OF JEFFREY CREECH

Irvine, California

Tuesday, December 19, 2006

Reported by:

MARJORY ELM

CSR No. 4871

JOB No. 1075A



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TRADEMARK TRIAL AND APPEAL BOARD

MENTHOLATUM COMPANY,)
)
Opposer,)
)
vs.)
)
THEROX, INC.,)
)
Applicant.)
_____)

Opposition No. 91160810

TESTIMONY DEPOSITION OF JEFFREY CREECH

Irvine, California

Tuesday, December 19, 2006

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MARJORY ELM

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Witness: Jeffrey Creech

<p>1 TRADEMARK TRIAL AND APPEAL BOARD</p> <p>2</p> <p>3</p> <p>4 MENTHOLATUM COMPANY,)</p> <p>5)</p> <p>6 Opposer,)</p> <p>7 vs.) Opposition No. 91160810</p> <p>8)</p> <p>9 THEROX, INC.,)</p> <p>10)</p> <p>11 Applicant.)</p> <p>12</p> <p>13</p> <p>14</p> <p>15 Testimony deposition of JEFFREY CREECH, taken</p> <p>16 on behalf of Applicant, at 2400 Michelson Drive,</p> <p>17 Irvine, California, beginning at 10:02 a.m. and</p> <p>18 ending at 12:20 p.m. on Tuesday, December 19, 2006,</p> <p>19 before MARJORY ELM, Certified Shorthand Reporter</p> <p>20 No. 4871.</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: right;">Page 2</p>	<p>1 INDEX</p> <p>2 WITNESS EXAMINATION</p> <p>3 JEFFREY CREECH</p> <p>4</p> <p>5 BY MS. WOJCIECHOWSKI 6</p> <p>6 BY MS. LINDQUIST 46</p> <p>7</p> <p>8</p> <p>9</p> <p>10 EXHIBITS</p> <p>11 APPLICANT'S PAGE</p> <p>12 1 Trademark electronic search system record 1 out</p> <p>13 of 1, 1 pg.</p> <p>14</p> <p>15 2 Photocopies of e-mails, 16 pgs.</p> <p>16</p> <p>17 3 Memo dated 8/4/03 to K. Root from J. Creech,</p> <p>18 3 pgs.</p> <p>19 4 Memo dated 7/9/03 to Skin Care Project Team</p> <p>20 from J. Creech, 5 pgs.</p> <p>21</p> <p>22 5 Print-out of Web site pages, 2 pgs.</p> <p>23</p> <p>24 6 Depiction of product labeling, 2 pgs.</p> <p>25</p> <p>26 7 Memo dated 3/20/03 to P. Zalesky from J. Creech,</p> <p>27 5 pgs.; survey, 4 pgs.; photocopy of pamphlet,</p> <p>28 2 pgs.</p> <p>29</p> <p>30 8 Report by Burnham Securities, June 2004, 23 pgs.</p> <p>31</p> <p>32 9 Memo dated 11/20/02 to Skin Care Program from</p> <p>33 J. Creech, 2 pgs.</p> <p>34 10 Handwritten notes, 14 pgs.</p> <p>35 11 Miscellaneous documents, 2 pgs.</p> <p style="text-align: right;">Page 4</p>
<p>1 APPEARANCES:</p> <p>2</p> <p>3 For Applicant:</p> <p>4 TRW LAW GROUP</p> <p>5 BY: TAWNYA R. WOJCIECHOWSKI</p> <p>6 Attorney at Law</p> <p>7 19900 MacArthur Boulevard, Suite 1150</p> <p>8 Irvine, California 92612-8433</p> <p>9 (949) 701-4747</p> <p>10</p> <p>11 For Opposer:</p> <p>12 SUGHRUE MION</p> <p>13 BY: LEIGH ANN LINDQUIST</p> <p>14 Attorney at Law</p> <p>15 2100 Pennsylvania Avenue, NW</p> <p>16 Washington, D.C. 20037-3213</p> <p>17 (202) 293-7060</p> <p>18</p> <p>19 Also Present:</p> <p>20 MARGARET A. KIVINSKI</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: right;">Page 3</p>	<p>1 INDEX (Cont'd.)</p> <p>2 EXHIBITS</p> <p>3 APPLICANT'S PAGE</p> <p>4 12 Memo dated 3/22/02 to Design History File from</p> <p>5 A. DeWinter, 4 pgs.</p> <p>6</p> <p>7 13 Label mock-ups, 3 pgs.</p> <p>8</p> <p>9 14 Invoices, 15 pgs.</p> <p>10</p> <p>11 15 Depiction of Oxy products, 2 pgs.; document</p> <p>12 entitled "Media Planning," 4 pgs.</p> <p>13 16 Letter dated 6/7/02 to M. Kivinski from</p> <p>14 G. Krugman, with inclusions, 18 pgs.</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: right;">Page 5</p>

Witness: Jeffrey Creech

<p>1 Irvine, California, Tuesday, December 19, 2006 2 10:02 a.m. - 12:20 p.m. 3 4 JEFFREY CREECH, 5 having been first duly sworn, was examined and testified as 6 follows: 7 8 EXAMINATION 9 BY MS. WOJCIECHOWSKI: 10 Q My name is Tawnya Wojciechowski. I'm here as 11 counsel for TherOx, Inc., in the Trademark Trial and Appeal 12 Board opposition No. 91160810. We're taking the testimony 13 deposition of Jeffrey Creech, and the caption for the TTAB, 14 which is the Trademark Trial and Appeal Board, opposition 15 is Mentholatum Company v. TherOx, Inc. Mentholatum is 16 represented here today by Leigh Ann Lindquist. 17 And if you want to state your appearance for the 18 record. 19 MS. LINDQUIST: I'm here today representing 20 Mentholatum Company. 21 BY MS. WOJCIECHOWSKI: 22 Q Can you state and spell your name full name for 23 the record, please. 24 A Jeffrey Creech, first name J-e-f-f-r-e-y, last 25 name C-r-e-e-c-h.</p> <p style="text-align: right;">Page 6</p>	<p>1 progressed into a program manager role, in which I actively 2 manage our topical oxygenated emulsion program, of which 3 the development of Oxium was a subset. And since that time 4 I have progressed into a role which includes having 5 interaction with the FDA through regulatory affairs and is 6 more slanted toward our medical device side. 7 Q And what is the business of TherOx, Inc.? 8 A TherOx is a registered medical device manager 9 manufacturer with the FDA. And we have also developed, for 10 the purpose of the proceedings today, an oxygenated cream 11 that has been used for cosmetic purposes. 12 Q And have you been involved in the development of 13 this oxygenated cream since its inception? 14 A Very nearly since its inception. The development 15 of the oxygenated cream started, I would estimate, in the 16 mid to late '90s. TherOx received initial funding for that 17 work through the National Institutes of Health. And after 18 some promising early work, we decided, as a group, and I 19 was here during that decision, to formalize the project, 20 and that's when I became the program manager of that 21 effort. 22 When we made it a project in and of itself, I had 23 full operational responsibility to execute the strategy for 24 developing the product. 25 Q And do you understand why we're here today?</p> <p style="text-align: right;">Page 8</p>
<p>1 Q And who are you employed by? 2 A TherOx, Incorporated. 3 Q And can you give the business address of your 4 employer. 5 A Yes. 2400 Michelson Drive, Irvine, California 6 92612. 7 Q And what is your position with TherOx? 8 A My title is program manager of research and 9 regulatory affairs. 10 Q I'm going to just have you give a little bit of a 11 background of yourself for purposes of laying foundation 12 for some questions that we'll be asking. So if you can 13 just give me a succinct summary of your educational 14 background post high school. 15 A Sure. I have a bachelor's degree in chemical 16 engineering that I obtained from Tulane University in 17 New Orleans. I have a doctor of philosophy in chemical 18 engineering which I obtained through the University of 19 California Berkeley. 20 My work experience is eight years here at TherOx. 21 I came to TherOx after completing my doctoral degree. 22 Early on at TherOx my initial title was R&D engineer, 23 working in research and development, of course. From there 24 I progressed into a project engineering role, working on 25 the development of medical devices. From there I</p> <p style="text-align: right;">Page 7</p>	<p>1 A Yes. 2 Q What is your understanding, if you could briefly 3 tell me, why? 4 A My understanding of our proceeding today is that 5 our application to trademark Oxium for our cosmetic cream 6 has been challenged by the company that holds the brand 7 Oxy. 8 Q And what, in the development of the oxygenated 9 cream product, were the goals of TherOx to bring that 10 product to market? 11 A What I'll focus on is the Oxium product, which is 12 for cosmetic purposes. And our goals in developing that 13 product, very broadly, were to choose a marketing channel 14 and a consumer base that would fit well with a very unique 15 technology, a very unique ingredient. 16 To give a little bit of background, we have 17 several patents that protect our technology for dissolving 18 oxygen in a cosmetic cream. And in the marketplace today, 19 there are no other cosmetic products that we have found or 20 tested that contain a substantial amount of dissolved 21 oxygen, so having that very unique product, our goals were 22 to find an appropriate product placement where we could 23 maximize the potential for what's considered fairly unique 24 to the cosmetic base and of an IP protection on an 25 ingredient.</p> <p style="text-align: right;">Page 9</p>

3 (Pages 6 to 9)

<p>1 Q You mentioned that the Oxium product is one of a 2 product that you intended to bring to market having an 3 oxygenated cream. Are there other products that you had 4 anticipated bringing to market that were not the 5 Oxium-branded oxygenated cream?</p> <p>6 A We never intended to market other products, but 7 our patented technology involves not only the Oxium 8 cosmetic product, but the initial impetus for medical 9 device manufacturers to explore oxygenated creams was in 10 the medical arena for wound healing, so a separate arm of 11 the oxygenated emulsion product, as we refer to it, was to 12 develop, to a certain extent, the oxygenated cream for 13 medicinal purposes and then to pursue a licensing of that 14 technology to companies that could take advantage of that 15 in the marketplace.</p> <p>16 Q And you anticipated this wound care product to be 17 separately branded from the Oxium product?</p> <p>18 A Yes. It had no relationship, by virtue of 19 branding, to the Oxium product.</p> <p>20 Q You mentioned that the technology used to create 21 the oxygenated -- sorry, I can't even say it, emulsified 22 oxygen cream to production involved a patented technique or 23 a process. Is this process an expensive one, or is this a 24 very cheap kind of item to make?</p> <p>25 A No. This is a very important point. The flip</p> <p style="text-align: right;">Page 10</p>	<p>1 \$50 as a minimum for a one-ounce can of product. And 2 that's the wholesale price. The final retail price in the 3 cosmetic market is typically two times the wholesale price.</p> <p>4 Q And this is based on your own research?</p> <p>5 A Yes.</p> <p>6 Q What is the target audience of your Oxium product?</p> <p>7 A Well, with that framework, with the price point 8 necessarily being somewhat higher than something you would 9 find at a drugstore or a Target or a Wal-Mart, we really 10 view this product as more along the lines of what's called 11 a prestige product in the cosmetic business. And the 12 prestige market segment, the way I'm defining it, would 13 include very high-end department stores, specialty stores.</p> <p>14 An example of a specialty skin care store would be 15 the mall retail outlet Sephora. And in particular a market 16 that really intrigued us in Southern California, where 17 we're located, a hot area for this is the professional and 18 dermatology segment, if you will. And that includes spas, 19 medi spas, where there are licensed aestheticians on staff 20 selling both services and high-end skin care products.</p> <p>21 And is more and more common, dermatologic 22 practices, and, in fact, plastic surgery practices will 23 supply aestheticians in-house to supply these products and 24 services as part of the office business model.</p> <p>25 Q So taking into account these particular markets</p> <p style="text-align: right;">Page 12</p>
<p>1 side of having this -- advantage of having a patented 2 protection on an oxygen cream is this product is not 3 typical in the cosmetic space. It actually costs some 4 money to make this product. It has expensive ingredients 5 that have to be processed in a certain way, specifically 6 under oxygen pressure. And, in fact, the canister that we 7 put the cream in has to be kept under pressure; you can't 8 just store this product in a jar or a tube dispenser. So 9 the net effect of all that is the cost of goods to make 10 this product is significantly higher than traditional 11 creams and lotions.</p> <p>12 Now, that cost barrier naturally pushes this 13 product -- in addition to its -- you know, the fact that 14 it's unique and you can't just get oxygen products on the 15 shelf, it pushes this product into a higher price point to 16 be viable from a business standpoint.</p> <p>17 Q And can you tell me on a per-unit basis the 18 anticipated price point that the product would have to be 19 put at in order to cover the cost of goods or production 20 cost?</p> <p>21 A I can estimate that. You know, we haven't done 22 scaled-up manufacturing of the product, but we'd be looking 23 for a wholesale price point, so the price we would charge 24 to distributors, we'd be looking for a wholesale price 25 point range of -- let's say, to put a window on it, 35- to</p> <p style="text-align: right;">Page 11</p>	<p>1 that you intend to and have, I presume, sold some of these 2 products, being a prestige market, who are your target 3 consumers?</p> <p>4 A Well, our target consumers are women. That's 5 generally who buys these kinds of products in bulk. Women 6 who regularly purchase services and products from licensed 7 aesthetician-based services, people who go to spas, people 8 who go to dermatologic practices, plastic surgery offices.</p> <p>9 It requires a little bit of disposable income of 10 the consumer to spend, and if I put an age range on that 11 type of consumer, we're talking about, broadly, age 30 to 12 60 or 65. The underlying assumption is that there's a 13 desire for anti-aging and cosmetic improvement procedures 14 on the part of the consumer.</p> <p>15 Q Would you anticipate that the Oxium product would 16 not be sold in any particular markets?</p> <p>17 A Well, it's completely unsuitable for mass market 18 retail based on the price point and the uniqueness of this 19 ingredient. There's a certain cache with having a unique 20 brand of ingredient, and it's our strong belief that 21 introducing it in a mass market, where profit margins would 22 be quite low, would absolutely compromise your ability to 23 market to these high-end businesses.</p> <p>24 Q Would you anticipate that product, because of its 25 manufacturing costs, would ever be sold in a mass market</p> <p style="text-align: right;">Page 13</p>

<p>1 environment?</p> <p>2 A It just is an illogical business practice to do</p> <p>3 that. The profit margins would be low, and no amount of</p> <p>4 volume sale would make up for what you'd be giving up in</p> <p>5 the prestige segment.</p> <p>6 Q Were you involved at all with the selection of</p> <p>7 adoption of the Oxium name to be associated with</p> <p>8 oxygenated -- I can't even say that word at all -- the</p> <p>9 oxygen emulsified cream?</p> <p>10 A Yes. My role as program manager, by default,</p> <p>11 meant I had oversight over that process. And we had a</p> <p>12 broad desire, when we started, to find out what consumers</p> <p>13 liked and didn't like about the idea of having oxygen in a</p> <p>14 cream, what perceptions they had and how we might play into</p> <p>15 that prestige segment.</p> <p>16 Q So now I'm focusing on the selection of the Oxium</p> <p>17 name. Can you just describe briefly for me the process</p> <p>18 that you went through to select that name.</p> <p>19 A Sure. We had a general desire that the name of</p> <p>20 the product be associated with oxygen, because that's its</p> <p>21 significant ingredient, it's what makes it special. And</p> <p>22 the actual mechanics of the process involved an iterative</p> <p>23 name selection conducted both internally by our marketing</p> <p>24 staff and employees. We did naming contests, we did</p> <p>25 brainstorming sessions to determine a short list of</p> <p style="text-align: right;">Page 14</p>	<p>1 example of this would be Peter Thomas Roth and Karen Herzog</p> <p>2 brands. They have a high price point, but from our</p> <p>3 perspective, that's highly misleading marketing, and we</p> <p>4 wanted to distance ourselves from those products and from</p> <p>5 Oxy because we felt there was a negative connotation there</p> <p>6 of harshness in the product base to the consumer.</p> <p>7 Q I think you named a couple products that you</p> <p>8 believed to be competitive in that same --</p> <p>9 A Yeah.</p> <p>10 Q -- prestige market. Can you tell me what the</p> <p>11 various competitive products, to your knowledge, would be</p> <p>12 to the Oxium product.</p> <p>13 A Sure. In that space I gave you two examples.</p> <p>14 Now, technically, we found no other product that actually</p> <p>15 contains oxygen in an elevated level as an ingredient, and</p> <p>16 we have laboratory testing to back up that assertion.</p> <p>17 Now, broadly, there are products that claim to be</p> <p>18 associated with oxygen in the cosmetic arena. I mentioned</p> <p>19 Peter Thomas Roth. That's kind of a broad brand. Karen</p> <p>20 Herzog's kind of a broad brand. We found a few others.</p> <p>21 One made by Luzern Laboratories. And Natura Bisse is</p> <p>22 another company. More generally within that prestige</p> <p>23 segment there are a number of brands that have been</p> <p>24 developed up from physician offices, like Obagi and</p> <p>25 Dr. Perricone's particular brand of product. All of these</p> <p style="text-align: right;">Page 16</p>
<p>1 suitable names. Then we would submit those names for</p> <p>2 opinion of trademarkability through our in-house IP</p> <p>3 counsel. And after going through that iterative process a</p> <p>4 couple of times, we had a short list of names, which</p> <p>5 included the eventual mark Oxium along with a few others.</p> <p>6 We had a marketing firm mock up some cans and labels, and</p> <p>7 we tested those. We consumer tested those names and labels</p> <p>8 and had a very favorable response to Oxium, which seemed to</p> <p>9 convey oxygen in a positive light in a product that we</p> <p>10 thought we could hit the prestige segment with.</p> <p>11 Q In your selection of the Oxium name, were you at</p> <p>12 any time aware of the brand Oxy, which is the opposer,</p> <p>13 owned by the opposer in this particular proceeding?</p> <p>14 A Yes, we were aware of the brand Oxy from the</p> <p>15 outset of the project. And, really, from our standpoint,</p> <p>16 it wasn't viewed at all as a competitive product, but we</p> <p>17 were very concerned that we wanted to distance our product</p> <p>18 from any kind of peroxidated cream or treatment. Oxy is,</p> <p>19 of course, a mass-market, low-price-point, anti-acne</p> <p>20 product, and if you want to sell a high-end cosmetic cream</p> <p>21 for anti-aging, it's going to have a negative connotation</p> <p>22 with that consumer if they associate it with a low-priced</p> <p>23 anti-acne product that contains peroxides.</p> <p>24 Peroxides in the prestige cosmetic base are also</p> <p>25 used in products that purport to have oxygen benefits. An</p> <p style="text-align: right;">Page 15</p>	<p>1 we would view as potentially competitive.</p> <p>2 Q And these are all products, again, that are found</p> <p>3 in the prestige marketing channel that you previously</p> <p>4 mentioned?</p> <p>5 A Yes.</p> <p>6 Q Let me show you some documents. I'll be</p> <p>7 introducing some documents as exhibits. The first document</p> <p>8 I'm going to show you is -- we're going to mark this</p> <p>9 Exhibit No. 1.</p> <p>10 (Applicant's Exhibit 1 was marked for</p> <p>11 identification by the court reporter.)</p> <p>12 BY MS. WOJCIECHOWSKI:</p> <p>13 Q While you -- well, I'll just ask the question.</p> <p>14 Are you familiar with what this document is?</p> <p>15 A Yes.</p> <p>16 Q What is this document?</p> <p>17 A This document is our Oxium trademark application</p> <p>18 that we filed some years ago which describes the class of</p> <p>19 goods, the mark, you know, some basic information about the</p> <p>20 company.</p> <p>21 Q And can you tell me what products are named in</p> <p>22 your trademark application for the mark Oxium?</p> <p>23 A Yeah. So if I read through the goods and</p> <p>24 services, we felt the mark was applicable for "Oxygenated</p> <p>25 skin care preparations; namely, creams, masks, gels and</p> <p style="text-align: right;">Page 17</p>

<p>1 lotions for the face, hands, feet, and body, not including 2 acne preparations." 3 Q And to your knowledge, is Oxium an acne 4 preparation? 5 A No, Oxium is not an acne preparation. 6 (Applicant's Exhibit 2 was marked for 7 identification by the court reporter.) 8 BY MS. WOJCIECHOWSKI: 9 Q I'm going to turn to the next document, and it's 10 Bates stamped TherOx 396, as Exhibit No. 2, and ask you if 11 you know what this document is. 12 A Yes. This is an e-mail from one of our marketing 13 employees to the company. It was sent to all employees of 14 the company to solicit an opinion on potential names for 15 the cosmetic skin care brand, and this was part of the 16 iterative process I discussed for eventually arriving to 17 the mark Oxium. 18 Q So as of January 10th, 2002, you had a product but 19 you didn't yet have a name? 20 A Correct. 21 Q Moving to the next page of Exhibit 2 marked TherOx 22 397, were these the names that were being circulated for 23 potential adoption for this oxygenated product? 24 A At that time this was the first list of products 25 that was sent out for general opinion on suitability.</p> <p style="text-align: right;">Page 18</p>	<p>1 A Yes. Yes, very closely. 2 Q The next page of Exhibit 2, TherOx 399 -- 3 A Yes. 4 Q -- are you familiar with this document? 5 A I'll have to read it. Yeah, this e-mail, the top 6 of which was one that I sent to Amy DeWinter, it kind of 7 hits on some of the points already made in conversation 8 today. I'm expressing a certain amount of skepticism about 9 "Oxy" types of names that seem to connote that harshness of 10 anti-acne medications. And at the same time, we pinpoint 11 again the market where we're looking at the cream, derms 12 and skin care professionals, and at the same time we do 13 need an oxygen connotation. 14 Q Moving to the next document of Exhibit 2, TherOx 15 400, I'll ask if you're familiar with this document. 16 A This was sort of a long list of cosmetic products 17 that were in this professional prestige segment that Amy 18 DeWinter compiled to give everyone a flavor of what has 19 currently been accepted in that marketplace to calibrate 20 ourselves for an effective name search. 21 Q And turning to the next page of Exhibit 2, 22 document TherOx 401, is this just more of a continuum of 23 the discussion of the name selection in culling down your 24 list? 25 A I'll have to review this document. Anderson Jones</p> <p style="text-align: right;">Page 20</p>
<p>1 Q Was this internally conducted at TherOx? 2 A Yes. Yes, this was to TherOx employees. 3 Q And if you'll turn to the next page of Exhibit 2, 4 which is TherOx 398, do you know what this document is? 5 A I'll need a moment to read this over. 6 Q And, please, when I show you any document, please 7 take the time to review it, either refamiliarize yourself 8 with it, or, if you haven't ever seen it before, then be 9 sure to read it before you answer questions. 10 A I've seen the document. I'm sure I provided this. 11 Q And was this an e-mail again associated with this 12 project of finding a name for the oxygen skin care product? 13 A Yes. And there was some conversation between 14 company management. Like the end of the e-mail, "Paul" 15 refers to Paul Zalesky, TherOx founder and former 16 president. He expressed a disagreement into the particular 17 selection of names that were on previous exhibits, and so 18 there was a general thought of let's revisit the exact 19 positioning of the name. 20 Q And who is Amy DeWinter? 21 A Amy DeWinter was a former marketing specialist and 22 manager at TherOx, and she was the person directly 23 conducting the name search. 24 Q And did you collaborate with her during each step 25 of this name selection process?</p> <p style="text-align: right;">Page 19</p>	<p>1 refers to an external marketing company that we got a 2 little bit of help from on the project. But the thought 3 was that, Hey, we can do the name in-house, we don't need 4 to hire an outside firm to do that. We thought we'd be 5 more effective to do that search internally and more cost 6 effective. 7 Q And I note toward the bottom of the page there's a 8 number of different potential names that are listed with a 9 number of them having "O2" in front of them. What is the 10 "O2" intended to represent? 11 A O2 is intended to present oxygen. The oxygen 12 molecule chemically is denoted by "O2," so that's simply 13 what it means. 14 Q And were any of these names selected for the 15 brand? 16 A No. 17 Q Turning to the next page of Exhibit 2 marked 18 TherOx 402, are you familiar with this document? 19 A Yes. There was some initial interest in a 20 potential mark O2Logics, "O2" connoting oxygen. However, 21 during our examination of trademarkability, we saw an 22 obvious conflict with an existing mark called Oxygen Logics 23 in the exact same class of goods. 24 Q Moving to the next page of Exhibit 2 marked TherOx 25 403, again, are you familiar with this document?</p> <p style="text-align: right;">Page 21</p>

Witness: Jeffrey Creech

<p>1 A I'll have to review it. It looks like another 2 short list of products that we were looking at in our 3 continued name search.</p> <p>4 Q Moving on to the next document, TherOx 404, again, 5 this is just more of the discussion internally at TherOx of 6 the name selection process?</p> <p>7 A Yes. This was an e-mail that I had sent to 8 Margaret Kivinski, our in-house IP counsel, to formally 9 look at the suitability of these three names.</p> <p>10 MS. WOJCIECHOWSKI: And just for the record, we 11 have produced this document to Mentholatum. By producing 12 this document, we do not intend or do waive any 13 attorney-client privileged communications.</p> <p>14 Q Moving to the next document, which is two pages 15 marked TherOx 405 and 406 within Exhibit 2, if you'd take a 16 moment to familiarize yourself with both pages. Can you 17 tell me what this document reflects?</p> <p>18 A So if you go to the initial e-mail, which is at 19 the bottom, I sent Margaret Kivinski another name to search 20 on Oxium, which of course we eventually branded. That name 21 was initially suggested to us by one of our employees, and 22 Oxium is -- or I was told it was the name of a legendary 23 material on Mars. So it's not a common word, it has an 24 oxygen connotation in the name, and we felt we had some 25 suitability here and perhaps an excellent chance at</p> <p style="text-align: right;">Page 22</p>	<p>1 names. We changed it to four.</p> <p>2 Q And were you a recipient of this e-mail?</p> <p>3 A Yes.</p> <p>4 Q And the four names that were being reviewed were?</p> <p>5 A The four names we were reviewing were Aeragen, 6 Oxium, Ingenue and Verdani.</p> <p>7 Q And moving to the next document, 410, again, this 8 is just a continuation of the discussion concerning these 9 four --</p> <p>10 A Yes.</p> <p>11 Q -- names?</p> <p>12 411, can you tell me what this document is?</p> <p>13 A This is an e-mail from Amy DeWinter to our outside 14 marketing group, Anderson Jones, where she basically wanted 15 to make sure that there were no potential conflicts with 16 using the mark on the European continent, any potential 17 pitfalls in another language.</p> <p>18 Q And were you a recipient of this e-mail?</p> <p>19 A Yes.</p> <p>20 Q Next document, 414, once you've had a chance to 21 familiarize yourself with this document, can you describe 22 to me what it is.</p> <p>23 A Yeah, I'll need a moment to read this. This is an 24 e-mail from our outside marketing firm to myself and Amy 25 DeWinter concerning they're already thinking about how we</p> <p style="text-align: right;">Page 24</p>
<p>1 trademarkability as well.</p> <p>2 Q So basically this was your first introduction to 3 the name Oxium into the review process for selection of a 4 brand name?</p> <p>5 A Yes.</p> <p>6 Q And at the time that you reviewed the use of 7 Oxium, did you have any desire to have any connotation with 8 the Oxy brand that's owned by opposer in these proceedings?</p> <p>9 A None.</p> <p>10 Q And the next document marked TherOx 407 is a 11 continuum of Exhibit 2. Are you familiar with this 12 document?</p> <p>13 A Yes. As we went further along in the process, we 14 started to arrive at a short list for consumer testing, and 15 these were considered the best choices, including Oxium.</p> <p>16 Q Next document -- off the record a moment. 17 (Discussion off the record.)</p> <p>18 BY MS. WOJCIECHOWSKI:</p> <p>19 Q All right, going on to the next document, numbered 20 TherOx 409, familiarize yourself with the document and let 21 me know what that is.</p> <p>22 A This was the communication between Amy DeWinter 23 and our outside groups that were going to conduct our 24 consumer testing of the names, and she was giving them some 25 instructions that they were originally set up to test three</p> <p style="text-align: right;">Page 23</p>	<p>1 might use the Oxium mark going forward and securing the URL 2 to create a Web site, and possibly a phone number, and they 3 were anxious to get the process started with developing the 4 imagery for the brand.</p> <p>5 (Applicant's Exhibit 3 was marked for 6 identification by the court reporter.)</p> <p>7 BY MS. WOJCIECHOWSKI:</p> <p>8 Q Moving on to the next exhibit, No. 3, Bates 9 numbered TherOx 379, I'll ask you to familiarize yourself 10 with this document, which goes from TherOx 379, 380, to 11 381.</p> <p>12 A This is a memo that I sent to Kim Root. Kim Root 13 is a licensed aesthetician who worked with us first as an 14 employee, then as a consultant on the project. Kim had 15 direct sales experience working for Obagi Medical, so we 16 felt like she was a good person to represent us, and in 17 developing some Web site copy for the Oxium Web site that 18 we wanted to get up and running, I sent this memo to Kim 19 for her suggestions on the appropriateness of Web site copy 20 that, to my recollection, by and large I wrote there for 21 the Web site.</p> <p>22 Q I direct your attention to following the heading 23 "The Science of Oxium" to the second paragraph, the next to 24 the last and last sentences of the second paragraph. You 25 state here that, "Through a patented process, oxygen is</p> <p style="text-align: right;">Page 25</p>

<p>1 dissolved into the specially formulated Oxium products, 2 which are packaged in pressurized cans that are designed to 3 keep the oxygen captured in solution until the cream is 4 dispensed for application." Is that the special canister 5 you were referring to earlier? 6 A Yes. That refers specifically to this very unique 7 dispensing can that we have. 8 Q And do you still agree with what you stated in the 9 last sentence there, "Oxium is not available in jars, 10 tubes, or sample packs because of the need to maintain the 11 product in a pressurized can"? 12 A Yes. That's the essential characteristic of the 13 product. 14 Q And going down to the last paragraph of that page, 15 TherOx 379, again, do you still agree with the first 16 sentence of that paragraph? 17 A Yes. It was very important to us to differentiate 18 a product that actually contains dissolved oxygen gas from 19 products that allude to oxygen effects when all they 20 contain is peroxides. 21 Q And if I move to the next page, TherOx 380, the 22 first full paragraph, which is just one sentence, do you 23 still agree with that statement? 24 A Yes. That's the most eloquent way to describe the 25 use of the product. It is a cosmetic product intended to</p> <p style="text-align: right;">Page 26</p>	<p>1 Q What is this memo? 2 A This is a memo that I prepared internally for the 3 members of the project team at TherOx where we discussed 4 our Oxium test marketing initiative. 5 To give a little background on that, we received 6 some positive feedback on the cream both internally and 7 through focus groups and through people who we had 8 basically given the cream away to free, and we wanted to 9 see how product feedback would look when customers paid 10 money for the product in the business establishment where 11 we would eventually sell it, so we established a test 12 market in a handful of spas and physician offices. And I 13 make reference to seven sites, including four spas, two 14 plastic surgery suites, and a dermatology practice. 15 Sales, you know -- and if I refer to page -- let's 16 see. On 371 we were actively selling initially the night 17 cream product. At the bottom of the page in the table, one 18 ounce was selling for 45 retail, suggested -- I'm sorry, 45 19 wholesale, a suggested retail price of \$90. In fact, I 20 believe it sold for more than that at a couple of 21 establishments. And I basically lay out a structure by 22 which, throughout the document, we could expand the test 23 market, moving forward to either establish the foundation 24 for further business or to make it more attractive and a 25 partnering opportunity through a direct line of products,</p> <p style="text-align: right;">Page 28</p>
<p>1 beautify and enhance the skin's appearance, and it speaks 2 directly to the marketing segment, "...available through 3 selected skin care professionals." 4 Q And then go down toward the bottom and see the 5 paragraph headed "Wound Healing." 6 A Yes. 7 Q Is that with reference to this other product line 8 that TherOx contemplated use of an oxygenated cream? 9 A Yes. I wouldn't even refer to it as a product 10 line; I'd refer to it as a project. We never intended to 11 market a wound version of the product. We wanted to 12 develop it, take it through some promising early-stage 13 clinicals, and then license that noncosmetic medical 14 technology to a third party. And it speaks to the fact 15 that that work was in fact funded by the Department of 16 Defense Advanced Research Projects Agency. 17 (Applicant's Exhibit 4 was marked for 18 identification by the court reporter.) 19 BY MS. WOJCIECHOWSKI: 20 Q Moving to the next document, Exhibit No. 4, 21 numbered TherOx 369 through 373, if you'll take a few 22 minutes and familiarize yourself with this document, I'm 23 going to ask you some questions concerning it. 24 A Okay. I'll need a few moments. Okay, I've had a 25 chance to skim over the memo.</p> <p style="text-align: right;">Page 27</p>	<p>1 et cetera. 2 Q I direct your attention on that same page, 371, to 3 the last sentence in the paragraph following the bullet 4 points and inquire, you said here, "Because the test market 5 is confined to the physician and spa market, no serious 6 conflict of interest is anticipated with potential mass 7 market license partners." What did you intend to mean by 8 that statement? 9 A Because cosmetic products are so heavily segmented 10 between different channels of trade, we didn't anticipate 11 any potential conflicts with actively marketing a product 12 in the same space as these mass market retailers. 13 Q At any point has TherOx contemplated actually 14 selling the Oxium product in a mass market environment? 15 A No. It's financially unsuitable for that. There 16 was a thought that a mass market licensed partner may want 17 a high-end professional product to complement their low-end 18 business. 19 Q And I believe you said earlier that the Oxium 20 product was available in a one-ounce can, but I see here 21 you're discussing in this memorandum the availability of a 22 four-ounce can. 23 A Yeah. In fact, I'm not sure if we sold any or 24 just tested samples. We did make some four-ounce cans. 25 The whole purpose of a four-ounce can is for professional</p> <p style="text-align: right;">Page 29</p>

<p>1 use, and this speaks to the market we were going to have. 2 Professional use basically means we would sell it -- it's 3 strictly a wholesale product to the spa where the licensed 4 aesthetician has a big can they can use to apply facials 5 and masks in office procedures. This four-ounce product 6 was not for one end consumer to take home. And that speaks 7 directly to this professional products segment. And some 8 other types of products were envisioned here. 9 (Applicant's Exhibit 5 was marked for 10 identification by the court reporter.) 11 BY MS. WOJCIECHOWSKI: 12 Q Turning to the next exhibit, No. 5, document 13 number TherOx 62, have you had a chance to review -- TherOx 14 63, sorry, a chance to review this page? Can you tell me 15 what it is? 16 A Yeah, this is copy from the Oxium.com Web site 17 that we put together. And I don't know if we iterated at 18 all from the memo that we discussed previously, but 19 basically the idea is to promote the Oxium brand through 20 the Web site and convey the message that we wanted to craft 21 for the product. 22 MS. WOJCIECHOWSKI: Leigh Ann, can we take five? 23 I need to go to the little girls' room. 24 MS. LINDQUIST: Oh, yeah, sure. 25 (Recess.)</p> <p style="text-align: right;">Page 30</p>	<p>1 test market that we conducted for Oxium that I mentioned 2 earlier when we were doing some previous documents. 3 Kim Root presented this to myself and Paul Zalesky as a way 4 of showing very good feedback on the product from our 5 initial test marketing experience and in this professional 6 high-end segment. 7 The survey which is attached to this was conducted 8 with -- this survey was for the licensed skin care 9 professionals on staff at these establishments. You know, 10 it was very important to us that we get the total buy-in of 11 the licensed professional that will ultimately be selling 12 this product to their clients at these businesses. 13 Q If you'll turn to page 342, and I'm just going to 14 direct your attention to question No. 6 and ask if you see 15 in that other -- the person taking this particular survey 16 wrote in the words "acne treatment." 17 A Yes. 18 Q Did you ever produce any acne treatment products 19 under the Oxium brand? 20 A No. That would be against federal law. Oxygen is 21 not approved for use as an anti-acne medication. We wanted 22 to steer clear of any connotation whatsoever that the 23 product was used as a drug. Anti-Acne products are all 24 approved drugs. 25 Q I'm turning your attention to the remaining two</p> <p style="text-align: right;">Page 32</p>
<p>1 (Applicant's Exhibit 6 was marked for 2 identification by the court reporter.) 3 BY MS. WOJCIECHOWSKI: 4 Q All right, back on the record. Moving to the next 5 document, Exhibit 6, TherOx 114-115, can you identify what 6 this document is? 7 A The picture on page 0114 is a picture of the 8 one-ounce Oxium can that we marketed in the test market 9 that was referred to commonly as the night cream. 10 Q And 115? 11 A 115 is the directions for use, the ingredients. 12 This appears directly on the can. 13 Q And so this is a depiction of how the Oxium brand 14 name is depicted physically on the product? 15 A Yes. 16 (Applicant's Exhibit 7 was marked for 17 identification by the court reporter.) 18 BY MS. WOJCIECHOWSKI: 19 Q Turning to the next Exhibit, No. 7, numbered 20 TherOx 340, 341, 342, 343, 344, and I'm reserving the 21 remaining two pages of Exhibit 7 separately for discussion, 22 can you identify for me what the content of 340 through 344 23 is. 24 A Yeah. Give me a moment just to look it over. 25 Okay, so this memo and attached survey are concerning the</p> <p style="text-align: right;">Page 31</p>	<p>1 pages of Exhibit No. 7 and ask if you know what this 2 document is. 3 A This looks like our tri-fold pamphlet that -- we 4 produced a tri-fold pamphlet to give out with the products 5 at the spas, salons, and physicians' offices where we were 6 conducting the test market that gives them a little bit of 7 basic information regarding the product and its use. 8 (Applicant's Exhibit 8 was marked for 9 identification by the court reporter.) 10 MS. WOJCIECHOWSKI: 11 Q Moving now to Exhibit No. 8, document numbered 12 TherOx 174, and it's a fairly large document, through 13 TherOx 197, I'll ask if you're familiar with this document. 14 A Yes. We made a strategic business decision that 15 we wanted to pursue a licensing of our oxygenated emulsion 16 technology to interested outside firms. To achieve that 17 end, we engaged in a business contract with Burnham 18 Securities of New York, New York City, to act as our broker 19 or agent in contacting potential license partners. 20 It is very common, when pursuing this type of 21 arrangement, to assemble what is referred to as "the book," 22 and the book is what is found in Exhibit 8. Exhibit 8 is a 23 potpourri of all kinds of information related to the 24 oxygenated emulsion project both in the cosmetic use of the 25 product under the brand name Oxium and under the</p> <p style="text-align: right;">Page 33</p>

1 nonbranded, noncommercial potential future medical uses of
2 the product as well.

3 Q Turn your attention to the same document, the page
4 numbered TherOx 180, and I'll turn your attention to the
5 fifth paragraph below the quotations and ask --

6 MS. LINDQUIST: Can you identify which paragraph
7 you guys are talking about?

8 MS. WOJCIECHOWSKI: Yeah. The paragraph that
9 begins with "In addition."

10 Q If you'll read that paragraph and tell me what
11 your understanding of Burnham's discussion here to be.

12 A Sure. "In addition, medicated skin creams,
13 particularly the anti-acne OTC market, represents a
14 realizable opportunity based upon initial results from a
15 pilot acne trial with the TherOx emulsion. Critically
16 important to these market segments would be the Sustainable
17 Competitive Advantage that the AOE technology will give to
18 the chosen market participants."

19 What Burnham is referring to here is a potential
20 licensing opportunity for the general emulsion technology
21 for medical use, particularly as envisioned as an anti-acne
22 product. This potential market play would not be with
23 Oxium or the cosmetic product associated with the brand but
24 rather the medical noncommercial product that we conducted
25 a limited acne study with. I think the results of that

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1 of the previously discussed ones that talk about the
2 initiation of our Oxium test market and how, logistically,
3 we'll handle the product roll-out initially as free samples
4 before transitioning to sales, et cetera.

5 Q Turning your attention to the last paragraph on
6 page 338 and asking you to discuss what your concerns were,
7 if there were any, on the legal side of things.

8 A On the legal side, and I'll read the sentence in
9 question here, we say that "No legal or contractual
10 impediments are anticipated that would delay product
11 release. The few remaining tasks to be completed prior to
12 release include the filing of patent applications for the
13 emulsion, expected in late December, and possibly obtaining
14 a noninfringement opinion on the Oxium trademark with
15 respect to previous filings for Oxy trademarks by
16 SmithKline Beecham."

17 Q And did you obtain any such opinion?

18 A I believe that we did, although I don't remember
19 obtaining -- I don't -- no, I don't remember if we obtained
20 them.

21 Q Did you have any specific concerns about any Oxy
22 trademarks owned by SmithKline Beecham?

23 A No, this would have been something that would have
24 been raised potentially by our IP department. I didn't
25 have any particular personal concerns over it.

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1 study are somewhere in this document. Burnham felt that we
2 should include any potential information we have regarding
3 the technology, so one page might be a cosmetic reference,
4 the next page might be a medical reference within this
5 document.

6 Q So the AOE technology, what does that reference?

7 AOE is an acronym for aqueous oxygen emulsion. I
8 referred to it as the topical oxygenated emulsion, which
9 doesn't lead to a flattering acronym, so AOE was chosen
10 here.

11 Q So in this discussion of the use of the AOE
12 technology in an acne-related product, this was not -- I'm
13 just confirming that this was not intended to be used under
14 the Oxium-branded name.

15 A No, it's a completely separate project to explore
16 medicinal use. Again, we want to emphasize that cosmetic
17 products, by definition, do not contain drug claims, and
18 anti-acne products are FDA-approved drugs.

19 (Applicant's Exhibit 9 was marked for
20 identification by the court reporter.)

21 BY MS. WOJCIECHOWSKI:

22 Q Moving on to the next exhibit, No. 9, TherOx
23 document No. 337 and 338, I'll ask you to familiarize
24 yourself with that document.

25 A This is an earlier memo that I prepared than some

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1 (Applicant's Exhibit 10 was marked for
2 identification by the court reporter.)

3 BY MS. WOJCIECHOWSKI:

4 Q Moving to the next document, Exhibit 10, and it's
5 page number TherOx 520 through 533, tell me if you're
6 familiar with this document.

7 A Okay, I'll need a few moments to review. Okay,
8 these are handwritten notes that I took regarding both some
9 background on the names and then some notes I took from
10 individual feedback from focus group participants. And
11 there's at least a couple of examples in this grouping on
12 the suitability of certain names and what we'd like to see
13 conveyed in an oxygen product.

14 Q And, again, was it important to you that the
15 product name convey the oxygen component of the emulsion?

16 A We thought it was critically important.

17 (Applicant's Exhibit 11 was marked for
18 identification by the court reporter.)

19 BY MS. WOJCIECHOWSKI:

20 Q Moving next to Exhibit No. 11, TherOx 494 and 495,
21 and I'll ask if you can identify what this document is.

22 A These are some examples of competitive brands and
23 ingredients that play into this specialty, prestige,
24 high-end skin care market. Seems to be very popular to
25 have a very hot ingredient, a very exclusive ingredient,

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<p>1 and that will support a high price point for the product. 2 It's a business model that's been used efficiently. 3 We mentioned Obagi before. Obagi makes this list 4 with hydroquinone and other ingredients. There are other 5 brands and associated ingredients that were considered at 6 the time, very hot and relevant in high-end. 7 (Applicant's Exhibit 12 was marked for 8 identification by the court reporter.) 9 BY MS. WOJCIECHOWSKI: 10 Q Turning to the next document, Exhibit No. 12, 11 TherOx 548 through 551, I'll ask that you review this 12 document. And if you do recognize this document, give me a 13 description of what it is. 14 A I'll just need a moment to review. Okay, so 15 page 548 is a memo that Amy DeWinter prepared for myself 16 and some other key management members that summarized how 17 the brand name Oxium had been selected after we had, as 18 we've discussed here today, narrowed down the list of four 19 names. An outside marketing group put those names forward 20 with mock labels to focus group participants that we had 21 engaged in previously before there was any name for the 22 technology, and Oxium tested well and was considered the 23 best choice. 24 Q I want to direct your attention to the sentence in 25 the middle of the second paragraph that says, "Aeragen</p> <p style="text-align: right;">Page 38</p>	<p>1 A We wanted a tagline associated with Oxium, you 2 know, sort of a one-liner to appear under the name very 3 prominently, and we felt very strongly about the 4 association of oxygen with the brand, and that particular 5 tagline for Oxium is "Skincare Through Oxygen Science," so 6 we try to connote a strong message there. 7 (Applicant's Exhibit 13 was marked for 8 identification by the court reporter.) 9 BY MS. WOJCIECHOWSKI: 10 Q So turning then to page -- I should say to 11 Exhibit 13, pages 750, 751, 752, if you'll take a moment to 12 review those and tell me what this references. 13 A Pages 751 and 752 are some of the product mock-ups 14 that were used in our consumer tests of this short list of 15 four names. And you'll see that all four of the names that 16 we've discussed are on those pages. The final copy that we 17 use for the product container in the brand is found on 18 page 750, and it's labeled "final copy." It's hard to 19 make out the tagline under Oxium, but it says, "Skincare 20 Through Oxygen Science," as we just discussed. 21 (Applicant's Exhibit 14 was marked for 22 identification by the court reporter.) 23 BY MS. WOJCIECHOWSKI: 24 Q Turning to the next exhibit, No. 14, TherOx 25 documents 755 through 769, do you know what these documents</p> <p style="text-align: right;">Page 40</p>
<p>1 tested most favorably overall, with Oxium as a strong 2 second." Is there any reason why the name Aeragen was not 3 selected instead of Oxium? 4 A Yes. In parallel with name selection, a 5 trademarkability review considered Aeragen to be a much 6 stronger risk than Oxium, and, therefore, Oxium has chosen 7 in that light as the brand. 8 Q And looking at pages 550 and 551, is this a 9 separate document from the prior pages? 10 A Yeah, this is a separate document. This isn't 11 part of that memo. Page 549 is a spreadsheet that I 12 believe I put formally together to quantitate the 13 preferences of some of these focus group participants. 14 Pages 550 and 551, once Oxium was selected as the brand of 15 choice, we put together a project input page for the 16 external marketing firm responsible for developing the 17 imagery for the can and brand. 18 And in the product positioning segment I wanted to 19 emphasize that we were very clear with the marketing firm 20 that this product will be positioned as a prestigious skin 21 care product and this type of positioning is not compatible 22 with the mass market. 23 Q Okay, if you'll look on page 551, see there that 24 you said a mandatory inclusion tagline must be related to 25 oxygen. What was that with reference to?</p> <p style="text-align: right;">Page 39</p>	<p>1 are? 2 A Let me familiarize myself with them. Okay, these 3 documents represent individual invoices to the various test 4 market sites that we chose to do a limited introduction of 5 the product. And following the initial free dispensation 6 of product, we sold the one-ounce cans that we've seen the 7 product mock-ups for a price of 45 wholesale to these 8 establishments for their retail use. 9 Q So on the invoice 760, referencing "item number, 10 Oxium night cream, shipped 1," what does "1" reference in 11 this particular order? 12 A "1" represents one case of 12 individual cans. So 13 12 cans times \$45, you arrive at the \$540 invoice. 14 Q So if you'll turn to page 766, you'll see a 15 "shipped .5" I assume that's half a case. 16 A Half a case, correct, six cans. 17 (Applicant's Exhibit 15 was marked for 18 identification by the court reporter.) 19 BY MS. WOJCIECHOWSKI: 20 Q Turning next to Exhibit No. 15, which consists 21 solely of documents Bates stamped OPP00024 and 00028, I'll 22 ask if you can identify what the depicted products are. 23 A I'll need a moment to review. The first document, 24 00024, appears to be a compilation of the Oxy products for 25 use in facial and anti-acne care.</p> <p style="text-align: right;">Page 41</p>

<p>1 The second document appears to depict these 2 products' placement on a mass market retail shelf. 3 Q That will be all of the exhibits that are 4 introduced in this deposition, but I am going to make 5 reference in questioning without revealing the document to 6 the deponent. For learned counsel's reference, these are 7 documents previously identified in opposer's testimony 8 deposition of Mr. Jim Brown as Exhibit No. 12, and they are 9 Bates numbered OPP00196 and OPP00197. 10 MS. LINDQUIST: I think the second page was 11 actually an exhibit in Bob Cantrell's deposition. 12 MS. WOJCIECHOWSKI: Okay. But you have no 13 objection to me making reference to these documents without 14 showing the deponent? 15 MS. LINDQUIST: Right. 16 MS. WOJCIECHOWSKI: For purposes of questioning 17 only. 18 Q I'm just going to ask you a couple quick questions 19 concerning places where you would anticipate having any 20 advertising appear for the Oxium products. Would you ever 21 anticipate any advertising placement by TherOx for the 22 Oxium product in a publication called Cosmo Girl? 23 A No. 24 Q In a publication called DC Comics? 25 A No.</p> <p style="text-align: right;">Page 42</p>	<p>1 Skateboarding Buyers Guide? 2 A No. 3 Q In any printed publication called Future 4 Snowboarding? 5 A No. 6 Q In any publication called DC Comics? 7 A No. 8 Q In a television advertising on Comedy Central? 9 A No. 10 Q Any television advertising on MTV? 11 A No. 12 Q Any television advertising intended to reach the 13 teen audience? 14 A No. 15 MS. WOJCIECHOWSKI: I think I'll take about five 16 to make sure I've covered everything, but I think I might 17 be done. We're putting you on mute. 18 (Recess.) 19 (Applicant's Exhibit 16 was marked for 20 identification by the court reporter.) 21 BY MS. WOJCIECHOWSKI: 22 Q I'm going to introduce one more document, the last 23 final Exhibit, No. 16, and ask you to take a look at it. I 24 don't have a Bates number, but it is a letter dated June 7, 25 2002, from Gary Krugman, who's with opposer's law firm,</p> <p style="text-align: right;">Page 44</p>
<p>1 Q In a publication called E-I-I-e Girl? 2 A No. 3 Q In a publication called Scholastic Teen? 4 A No. 5 Q In a publication called SI For Kids? 6 A No. 7 Q In a publication called Teen People? 8 A No. 9 Q In any cable or Internet placement on Teen Cable? 10 A No. 11 Q In a printed publication called Sports Illustrated 12 For Kids? 13 A No. 14 Q In any printed publication called Transworld - 15 Ride BMX? 16 A No. 17 Q In any publication called Transworld - 18 Skateboarding? 19 A No. 20 Q In any printed publication called Transworld - 21 Motocross? 22 A No. 23 Q In any printed publication called MAD Magazine? 24 A No. 25 Q In any printed publication called Future</p> <p style="text-align: right;">Page 43</p>	<p>1 which is spelled S-u-g-h-r-u-e, new word Mion. 2 It's actually a document you gave to us, TherOx 3 0135 and 0136. 4 MS. LINDQUIST: Okay. 5 BY MS. WOJCIECHOWSKI: 6 Q I'll ask if you've ever seen this document before. 7 A I believe, after reviewing the document, that I 8 did see this several years ago after it was transmitted to 9 Margaret Kivinski. 10 Q And because of the date being June 7, 2002, does 11 that have any impact on your review of Exhibit No. 9, 12 TherOx 337 and 338? 13 A Yes. So this memo that I wrote on November 20th, 14 2002, having a sentence under the legal portion of that 15 document on page 338 which refers to obtaining a 16 noninfringement opinion on the Oxy trademark with respect 17 to previous filings for Oxy by SmithKline Beecham, I'm sure 18 I inserted that sentence in reference to that letter. I 19 couldn't remember those details before reviewing the 20 letter. 21 Q At any time before receiving this letter at that 22 time from the owner of the Oxy mark, SmithKlineGlaxo -- I'm 23 sorry, SmithKline Beecham, did you have any concerns with 24 any infringement by the use of the Oxium trademark with 25 respect to the Oxy trademark owned by SmithKline Beecham?</p> <p style="text-align: right;">Page 45</p>

<p>1 A No.</p> <p>2 MS. WOJCIESHOWSKI: Okay, that will do it for us</p> <p>3 and our testimony deposition. We will open for</p> <p>4 cross-examination by Mentholatum's attorney.</p> <p>5</p> <p>6 EXAMINATION</p> <p>7 BY MS. LINDQUIST:</p> <p>8 Q Okay, let's go back and talk about the Oxium</p> <p>9 product a little bit.</p> <p>10 MS. WOJCIECHOWSKI: Can you speak up a little bit?</p> <p>11 BY MS. LINDQUIST:</p> <p>12 Q Let's go back and talk about the Oxium product.</p> <p>13 And if you'll go to Exhibit 3, on the first page, the third</p> <p>14 paragraph, you mentioned that it's not available in jars,</p> <p>15 that it's only available in pressurized cans, right?</p> <p>16 A Yes.</p> <p>17 Q Is it possible to put a gel in a pressurized can?</p> <p>18 A Yes. Let me give you a little bit of technical</p> <p>19 explanation of our product canister. It's very unique and</p> <p>20 not something that every consumer has handled in the</p> <p>21 cosmetics placement. It's what we call an indirect aerosol</p> <p>22 can. The product is in an aerosol can in that there's</p> <p>23 pressurized gas in the container that propels the product,</p> <p>24 but the pressurized gas is inert and it surrounds a</p> <p>25 gas-impermeable baggy that actually contains our liquid</p> <p style="text-align: right;">Page 46</p>	<p>1 Oxium.com?</p> <p>2 A Internally at TherOx.</p> <p>3 Q Did you refer to any materials of competitors when</p> <p>4 you were developing that material?</p> <p>5 A Not that we're aware of.</p> <p>6 Q I've got a question about Exhibit 4. The third</p> <p>7 page in it is 371. And we talked about this, or you</p> <p>8 discussed this a little bit, the test market for the</p> <p>9 physician and spa market, and you don't anticipate a</p> <p>10 conflict with a potential mass market license partner.</p> <p>11 When you were discussing this particular sentence, which is</p> <p>12 in the first full paragraph of that page 371, you mentioned</p> <p>13 that you might want to partner with someone who offers a</p> <p>14 low-end product and a complement to that would be a</p> <p>15 high-end product. What did you mean by that?</p> <p>16 A Oh, it's quite simple. If a mass market retailer</p> <p>17 wants a -- you know, our impression is that -- I'll give</p> <p>18 you a brand example, Neutrogena. Neutrogena sells</p> <p>19 mass-market products. They have been actively looking for</p> <p>20 something they can transition to the prestige channel</p> <p>21 because they want higher profit margins. They can't do</p> <p>22 that at the mass level, so our feeling was maybe these</p> <p>23 traditional mass-market companies would want to acquire a</p> <p>24 product they can market in these high-end cosmetic</p> <p>25 channels.</p> <p style="text-align: right;">Page 48</p>
<p>1 product to dispense. So unlike a traditional aerosol can,</p> <p>2 the aerosol gas is not in contact with the product and is</p> <p>3 not dispensed with the product, so this type of can can be</p> <p>4 used on any type of liquid formulation in order to store it</p> <p>5 under pressure.</p> <p>6 Q And then going back to Exhibit 2, the last page of</p> <p>7 that exhibit, which is marked TherOx 0414, the second</p> <p>8 paragraph there says, "When you get a chance, could you go</p> <p>9 to www.oxygenbotanicals.com and review their marketing</p> <p>10 story to see how this might relate to what we want to or</p> <p>11 can say about Oxium." Can you tell me what oxygen</p> <p>12 botanicals is in 2002 and what you were going to take from</p> <p>13 their marketing story?</p> <p>14 A I can't remember that Web site or if I reviewed</p> <p>15 it.</p> <p>16 Q Did you use anyone else's marketing story to come</p> <p>17 up with the information that you introduced in your</p> <p>18 exhibits here as indicating that it comes from the Web site</p> <p>19 that you maintain at Oxium.com?</p> <p>20 MS. WOJCIECHOWSKI: Objection. Argumentative.</p> <p>21 You can answer.</p> <p>22 BY MS. LINDQUIST:</p> <p>23 Q You can answer the question.</p> <p>24 A No.</p> <p>25 Q How did you develop the information that's at</p> <p style="text-align: right;">Page 47</p>	<p>1 Q Moving to Exhibit 7, you said that the last pages</p> <p>2 of that -- or I guess the middle pages, 341 through 344,</p> <p>3 that was a survey. Is this just a sample? Were there</p> <p>4 other surveys that were like this one?</p> <p>5 A Yes. This looks like one person's survey that</p> <p>6 they filled out.</p> <p>7 Q And then when we looked at Exhibit 8, we</p> <p>8 specifically looked at page 0180. You mentioned there was</p> <p>9 a pilot acne trial. Can you tell me a little bit about</p> <p>10 that trial?</p> <p>11 A Yes. With the other arm of the project concerning</p> <p>12 nonmarketed, nonbranded use of the emulsion for medical</p> <p>13 purposes, we sent a number of oxygenated cream samples that</p> <p>14 were formulated in a way that we thought might be effective</p> <p>15 in anti-acne and we conducted a 10-person study with a</p> <p>16 leading dermatologist to determine if there was any benefit</p> <p>17 to that.</p> <p>18 Q Were the ingredients in those trial products</p> <p>19 identical to the ingredients in the Oxium product?</p> <p>20 A No.</p> <p>21 Q How were they different?</p> <p>22 A Well, the base formulation was different. It did</p> <p>23 have an elevated level of oxygen.</p> <p>24 Q And that's where the similarity is between that</p> <p>25 particular trial product and the Oxium product?</p> <p style="text-align: right;">Page 49</p>

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<p>1 A Yes.</p> <p>2 Q And then on that same page below that paragraph</p> <p>3 that talks about the pilot trials, there's a figure 1, and</p> <p>4 it says "Skin Care," which seems to encompass facial care,</p> <p>5 body care, hand care, and then "Sun Care" sort of in its</p> <p>6 own little area. Where does acne appear on this bar chart?</p> <p>7 A There is no bar chart for acne. Again, I want to</p> <p>8 emphasize that Exhibit 8 is the book prepared by Burnham</p> <p>9 Securities for the entire envelope of the emulsion</p> <p>10 technology, so it's somewhat confusing to read through it</p> <p>11 and find that one page or one paragraph might be medical</p> <p>12 followed by cosmetic or maybe even a mixture of the two,</p> <p>13 and insofar as the material refers to cosmetics, that would</p> <p>14 apply to the Oxium brand.</p> <p>15 Q So when you say that acne products are regulated</p> <p>16 by the FDA, what exactly do you mean by that?</p> <p>17 A They're specifically regulated as drugs.</p> <p>18 Cosmetics are regulated too, but in order to make a product</p> <p>19 claim on your label that says product X can be used to</p> <p>20 treat acne, the ingredient -- the active ingredient, as I'm</p> <p>21 sure you know, the Oxy containers have an active, anti-acne</p> <p>22 ingredient, it has to be established for that purpose.</p> <p>23 Oxium contains no ingredient that's been established as an</p> <p>24 anti-acne ingredient by the FDA, so labeling the product</p> <p>25 that way would violate the Food, Drug, and Cosmetic Act.</p> <p style="text-align: right;">Page 50</p>	<p>1 Q Is retinol used to treat -- or as an anti-aging</p> <p>2 ingredient?</p> <p>3 A Very commonly so.</p> <p>4 Q Even though Oxium apparently can't be labeled as</p> <p>5 an acne product, in your opinion would use of Oxium help</p> <p>6 someone with their acne, could it?</p> <p>7 A Potentially. I have no direct data to support</p> <p>8 that.</p> <p>9 Q But potentially it could?</p> <p>10 MS. WOJCIECHOWSKI: Speculative.</p> <p>11 You can answer.</p> <p>12 THE WITNESS: Potentially, yes.</p> <p>13 BY MS. LINDQUIST:</p> <p>14 Q Are the ultimate end users of the Oxium product,</p> <p>15 not the skin care professional but the person that actually</p> <p>16 gets it on their face, are they told not to use any other</p> <p>17 products but the skin care product?</p> <p>18 MS. WOJCIECHOWSKI: Hearsay.</p> <p>19 BY MS. LINDQUIST:</p> <p>20 Q You can answer the question.</p> <p>21 MS. WOJCIECHOWSKI: Lack of personal knowledge, no</p> <p>22 foundation.</p> <p>23 BY MS. LINDQUIST:</p> <p>24 Q When you market these Oxium products to skin care</p> <p>25 professionals, do you tell the skin care professional that</p> <p style="text-align: right;">Page 52</p>
<p>1 Q Moving to Exhibit 10, you said that these were</p> <p>2 notes that you took and some of them stem more from focus</p> <p>3 groups. So, for example, the pages that are marked 523</p> <p>4 through 524, at the top it says, "Becky, female, age 29."</p> <p>5 A Yes.</p> <p>6 Q Correct me if I'm wrong. I'm assuming you would</p> <p>7 be at the focus group and Becky, age 29, was one of the</p> <p>8 women at the focus group and it was a discussion and you</p> <p>9 just took those notes as she was responding to questions.</p> <p>10 Was there a power point used in the focus group, or was it</p> <p>11 an oral conversation?</p> <p>12 A I don't remember the exact details. I think it</p> <p>13 was oral communication, you know, where the moderator had</p> <p>14 more or less a cue card of issues.</p> <p>15 Q Did the participants have cue cards?</p> <p>16 A I don't remember the participants having any</p> <p>17 materials in front of them.</p> <p>18 Q All right. And then Exhibit 11, these are medical</p> <p>19 skin care lines, and then it has ingredients.</p> <p>20 A Yes.</p> <p>21 Q Are any of these ingredients recognized for use in</p> <p>22 acne care?</p> <p>23 A Salicylic acid is used as an anti-acne product.</p> <p>24 Q What about retinol?</p> <p>25 A I have no direct knowledge.</p> <p style="text-align: right;">Page 51</p>	<p>1 the end user is not to use any other skin care products</p> <p>2 except Oxium?</p> <p>3 A No, we don't give them that instruction.</p> <p>4 Q Is there any sort of printed information that you</p> <p>5 give to a skin care professional that says that?</p> <p>6 A No.</p> <p>7 Q Have you ever used the Oxium product?</p> <p>8 A In the laboratory, yes.</p> <p>9 Q Have you used it on yourself?</p> <p>10 A Yes. In a laboratory setting.</p> <p>11 MS. WOJCIECHOWSKI: You're getting a guy to admit</p> <p>12 to this here.</p> <p>13 THE WITNESS: I do not have substantial wrinkling,</p> <p>14 so I'm blessed in that regard.</p> <p>15 BY MS. LINDQUIST:</p> <p>16 Q I'm sorry for asking a question like that. I'm</p> <p>17 sorry.</p> <p>18 You maintain a Web site at Oxium.com.</p> <p>19 A Yes.</p> <p>20 Q What sort of information do you have on that Web</p> <p>21 site regarding marketing for the Oxium product?</p> <p>22 A I'd have to review the exhibit again which shows</p> <p>23 the copy.</p> <p>24 MS. WOJCIECHOWSKI: It would be Exhibit No. 5. To</p> <p>25 the extent that that's -- two pages.</p> <p style="text-align: right;">Page 53</p>

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<p>1 THE WITNESS: Yeah, the information is not -- 2 there's not a lot -- it has very basic information about 3 who TherOx is and what TherOx does and that Oxium contains 4 a great deal of oxygen and that that's unique and the fact 5 that we have oxygen contained in the cream is something 6 that is very different from other products. 7 BY MS. LINDQUIST: 8 Q So at the top of this it looks like there are 9 things you can click on, and one of those areas is "Find A 10 Specialist." Do you see that at the top of the page? 11 A Yeah, I think there was a place holder for that. 12 Q So if I clicked on that, would that take me to 13 find a skin care professional? 14 A You know, I'd have to click through the menus 15 specifically to speak to that. The Web site was set up 16 with an eye toward further ramp-up in this activity, which 17 did not materialize. 18 Q Are there plans to further develop the Oxium.com 19 Web site? 20 A We have no current plans to expand the Web site. 21 Q Is the Oxium product available anywhere today? 22 A I would say that as of today, the limited test 23 market is not activity active. We've probably had one or 24 two direct sales of product this calendar year. 25 Q Does TherOx intend to continue trying to market</p> <p style="text-align: right;">Page 54</p>	<p>1 Perricone? 2 A P-e-r-r-i-c-o-n-e. 3 Q And what brands do they market their products 4 under? 5 A I can't remember the specific brand, but it's a 6 very successful story of a physician who came up with not 7 only this line of skin care products but he extended it 8 into diet and nutrition for healthy skin. It speaks to 9 this prestige channel, building it from the grassroots up. 10 Q Would you consider Arbonne to be a competitor? 11 A I have no direct knowledge of that brand. 12 Q So right now does TherOx have a continued intent 13 to offer oxygenated skin care preparations, namely creams, 14 masks, gels, lotions for the face, hands, feet, and body? 15 A Yes. But the business path is not well defined 16 right now. 17 Q What do you mean by that? 18 A We have active discussions ongoing to potentially 19 license the Oxium brand and technology. And of course our 20 option is always open to resume marketing ourselves if the 21 licensing discussions don't lead to a signed agreement. 22 (Whereupon the following testimony is deemed 23 confidential and contained in a separate volume 24 of the transcript.) 25 //</p> <p style="text-align: right;">Page 56</p>
<p>1 Oxium in 2007? 2 A TherOx has no definitive plans to directly market 3 Oxium in 2007 as of today. 4 Q The companies that previously ordered the product 5 that we saw in Exhibit 14, the invoices, none of those 6 companies are currently ordering product? 7 A The last order that we had, and I'm not certain of 8 the date, was in fact by one of these companies. I don't 9 know if the latest invoice was included. Because of other 10 strategic business decisions, we would not fulfill an order 11 placed today. 12 Q Okay. I don't have that much more, I promise. 13 Exhibit 12, page 550, the project input, one of the 14 features of the product is, No. 3, the formulas are oil 15 free. Why is that important to mention or why was it 16 important to mention? 17 A The idea behind that is that the product is not 18 overly greasy feeling to the skin. 19 Q Was there any additional reason to include that 20 information, for example, that it wouldn't cause 21 break-outs, acne break-outs, in a user? 22 A No, we weren't focused on acne or anti-acne 23 potential at that time. 24 Q At the beginning of your deposition you mentioned 25 a competitor, Dr. Perricone. Can you spell that for me,</p> <p style="text-align: right;">Page 55</p>	<p>1 (Whereupon nonconfidential portion of transcript 2 is resumed.) 3 MS. LINDQUIST: Okay. I don't think I have 4 anything else. 5 MS. WOJCIECHOWSKI: And I have no follow-up. 6 MS. LINDQUIST: Okay. 7 MS. WOJCIECHOWSKI: So do we want to handle this 8 where the original transcript will be sent to counsel for 9 TherOx, and I will have the deponent review it, if he has 10 any changes or comments, we will put those on a sheet and 11 send the original signed -- actually say I will submit the 12 original signed deposition to the Trademark Trial and 13 Appeal board and send a copy to counsel for Mentholatum 14 within 30 days. 15 MS. LINDQUIST: Yes. 16 MS. WOJCIECHOWSKI: After receipt from the court 17 reporter. 18 MS. LINDQUIST: Yes. When he's had a chance to 19 review it. 20 MS. WOJCIECHOWSKI: So that concludes this 21 deposition. Thank you for your appearance today. 22 MS. LINDQUIST: And thank you very much for 23 changing the time for me. I very much appreciate that. 24 MS. WOJCIECHOWSKI: The deponent will sign the 25 deposition under penalty of perjury along with any changes</p> <p style="text-align: right;">Page 59</p>

15 (Pages 54 to 59)

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<p>1 or comments that he might have for such transcript. 2 // 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: right;">Page 60</p>	<p>1 2 3 4 I, the undersigned, a Certified Shorthand Reporter 5 of the State of California, do hereby certify: 6 That the foregoing proceedings were taken before me at the 7 time and place herein set forth; that any witnesses in the 8 foregoing proceedings, prior to testifying, were placed 9 under oath; that a verbatim record of the proceedings was 10 made by me using machine shorthand which was thereafter 11 transcribed under my direction; further, that the foregoing 12 is an accurate transcription thereof. 13 I further certify that I am neither financially interested 14 in the action nor a relative or employee of any attorney of 15 any of the parties. 16 IN WITNESS WHEREOF, I have this date subscribed my 17 name. 18 19 Dated: _____ 20 21 _____ 22 MARJORY ELM 23 CSR No. 4871 24 25</p> <p style="text-align: right;">Page 62</p>
<p>1 2 3 4 5 6 7 8 I, JEFFREY CREECH, do hereby declare under 9 penalty of perjury that I have read the foregoing 10 transcript; that I have made any corrections as appear 11 noted, in ink, initialed by me, or attached hereto; that my 12 testimony as contained herein, as corrected, is true and 13 correct. 14 EXECUTED this _____ day of _____, 15 _____, at _____, 16 (City) (State) 17 18 19 _____ 20 JEFFREY CREECH 21 22 23 24 25</p> <p style="text-align: right;">Page 61</p>	

<p>A</p> <p>ability 13:22</p> <p>absolutely 13:22</p> <p>accepted 20:19</p> <p>account 12:25</p> <p>accurate 62:12</p> <p>achieve 33:16</p> <p>acid 51:23</p> <p>acne 18:2,3,5 32:16,18 34:15,25 49:9 50:6,7 50:15,20 51:22 52:5 52:6 55:21,22</p> <p>acne-related 35:12</p> <p>acquire 48:23</p> <p>acronym 35:7,9</p> <p>act 33:18 50:25</p> <p>action 62:14</p> <p>active 50:20,21 54:23 56:18</p> <p>actively 8:1 28:16 29:11 48:19</p> <p>activity 54:16,23</p> <p>actual 14:22</p> <p>addition 11:13 34:9,12</p> <p>additional 55:19</p> <p>address 7:3</p> <p>admit 53:11</p> <p>adoption 14:7 18:23</p> <p>Advanced 27:16</p> <p>advantage 10:14 11:1 34:17</p> <p>advertising 42:20,21 44:8,10,12</p> <p>Aeragen 24:5 38:25 39:2,5</p> <p>aerosol 46:21,22 47:1,2</p> <p>aesthetician 25:13 30:4</p> <p>aestheticians 12:19,23</p> <p>aesthetician-based 13:7</p> <p>affairs 7:9 8:5</p> <p>age 13:10,11 51:4,7</p> <p>Agency 27:16</p> <p>agent 33:19</p> <p>ago 17:18 45:8</p> <p>agree 26:8,15,23</p> <p>agreement 56:21</p> 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1 TRADEMARK TRIAL AND APPEAL BOARD

2
3
4 MENTHOLATUM COMPANY,)

5 Opposer,)

6 vs.)

Opposition No. 91160810

7 THEROX, INC.,)

8 Applicant.)
9

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14
15 Testimony deposition of JEFFREY CREECH, taken
16 on behalf of Applicant, at 2400 Michelson Drive,
17 Irvine, California, beginning at 10:02 a.m. and
18 ending at 12:20 p.m. on Tuesday, December 19, 2006,
19 before MARJORY ELM, Certified Shorthand Reporter
20 No. 4871.
21
22
23
24
25

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Witness: Jeffrey Creech

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14	2 Photocopies of e-mails, 16 pgs.	
15	3 Memo dated 8/4/03 to K. Root from J. Creech,	
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17	4 Memo dated 7/9/03 to Skin Care Project Team	
18	from J. Creech, 5 pgs.	
19	5 Print-out of Web site pages, 2 pgs.	
20	6 Depiction of product labeling, 2 pgs.	
21	7 Memo dated 3/20/03 to P. Zalesky from J. Creech,	
22	5 pgs.; survey, 4 pgs.; photocopy of pamphlet,	
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12 Memo dated 3/22/02 to Design History File from
A. DeWinter, 4 pgs.

13 Label mock-ups, 3 pgs.

14 Invoices, 15 pgs.

15 Depiction of Oxy products, 2 pgs.; document
entitled "Media Planning," 4 pgs.

16 Letter dated 6/7/02 to M. Kivinski from
G. Krugman, with inclusions, 18 pgs.

CONFIDENTIAL PORTION OF TRANSCRIPT

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1 Irvine, California, Tuesday, December 19, 2006

2 10:02 a.m. - 12:20 p.m.

3
4 JEFFREY CREECH,

5 having been first duly sworn, was examined and testified as
6 follows:

7
8 EXAMINATION

9 BY MS. WOJCIECHOWSKI:

10 Q My name is Tawnya Wojciechowski. I'm here as
11 counsel for TherOx, Inc., in the Trademark Trial and Appeal
12 Board opposition No. 91160810. We're taking the testimony
13 deposition of Jeffrey Creech, and the caption for the TTAB,
14 which is the Trademark Trial and Appeal Board, opposition
15 is Mentholatum Company v. TherOx, Inc. Mentholatum is
16 represented here today by Leigh Ann Lindquist.

17 And if you want to state your appearance for the
18 record.

19 MS. LINDQUIST: I'm here today representing
20 Mentholatum Company.

21 BY MS. WOJCIECHOWSKI:

22 Q Can you state and spell your name full name for
23 the record, please.

24 A Jeffrey Creech, first name J-e-f-f-r-e-y, last
25 name C-r-e-e-c-h.

1 Q And who are you employed by?

2 A TherOx, Incorporated.

3 Q And can you give the business address of your
4 employer.

5 A Yes. 2400 Michelson Drive, Irvine, California
6 92612.

7 Q And what is your position with TherOx?

8 A My title is program manager of research and
9 regulatory affairs.

10 Q I'm going to just have you give a little bit of a
11 background of yourself for purposes of laying foundation
12 for some questions that we'll be asking. So if you can
13 just give me a succinct summary of your educational
14 background post high school.

15 A Sure. I have a bachelor's degree in chemical
16 engineering that I obtained from Tulane University in
17 New Orleans. I have a doctor of philosophy in chemical
18 engineering which I obtained through the University of
19 California Berkeley.

20 My work experience is eight years here at TherOx.
21 I came to TherOx after completing my doctoral degree.
22 Early on at TherOx my initial title was R&D engineer,
23 working in research and development, of course. From there
24 I progressed into a project engineering role, working on
25 the development of medical devices. From there I

1 progressed into a program manager role, in which I actively
2 manage our topical oxygenated emulsion program, of which
3 the development of Oxium was a subset. And since that time
4 I have progressed into a role which includes having
5 interaction with the FDA through regulatory affairs and is
6 more slanted toward our medical device side.

7 Q And what is the business of TherOx, Inc.?

8 A TherOx is a registered medical device manager
9 manufacturer with the FDA. And we have also developed, for
10 the purpose of the proceedings today, an oxygenated cream
11 that has been used for cosmetic purposes.

12 Q And have you been involved in the development of
13 this oxygenated cream since its inception?

14 A Very nearly since its inception. The development
15 of the oxygenated cream started, I would estimate, in the
16 mid to late '90s. TherOx received initial funding for that
17 work through the National Institutes of Health. And after
18 some promising early work, we decided, as a group, and I
19 was here during that decision, to formalize the project,
20 and that's when I became the program manager of that
21 effort.

22 When we made it a project in and of itself, I had
23 full operational responsibility to execute the strategy for
24 developing the product.

25 Q And do you understand why we're here today?

1 A Yes.

2 Q What is your understanding, if you could briefly
3 tell me, why?

4 A My understanding of our proceeding today is that
5 our application to trademark Oxium for our cosmetic cream
6 has been challenged by the company that holds the brand
7 Oxy.

8 Q And what, in the development of the oxygenated
9 cream product, were the goals of TherOx to bring that
10 product to market?

11 A What I'll focus on is the Oxium product, which is
12 for cosmetic purposes. And our goals in developing that
13 product, very broadly, were to choose a marketing channel
14 and a consumer base that would fit well with a very unique
15 technology, a very unique ingredient.

16 To give a little bit of background, we have
17 several patents that protect our technology for dissolving
18 oxygen in a cosmetic cream. And in the marketplace today,
19 there are no other cosmetic products that we have found or
20 tested that contain a substantial amount of dissolved
21 oxygen, so having that very unique product, our goals were
22 to find an appropriate product placement where we could
23 maximize the potential for what's considered fairly unique
24 to the cosmetic base and of an IP protection on an
25 ingredient.

1 Q You mentioned that the Oxium product is one of a
2 product that you intended to bring to market having an
3 oxygenated cream. Are there other products that you had
4 anticipated bringing to market that were not the
5 Oxium-branded oxygenated cream?

6 A We never intended to market other products, but
7 our patented technology involves not only the Oxium
8 cosmetic product, but the initial impetus for medical
9 device manufacturers to explore oxygenated creams was in
10 the medical arena for wound healing, so a separate arm of
11 the oxygenated emulsion product, as we refer to it, was to
12 develop, to a certain extent, the oxygenated cream for
13 medicinal purposes and then to pursue a licensing of that
14 technology to companies that could take advantage of that
15 in the marketplace.

16 Q And you anticipated this wound care product to be
17 separately branded from the Oxium product?

18 A Yes. It had no relationship, by virtue of
19 branding, to the Oxium product.

20 Q You mentioned that the technology used to create
21 the oxygenated -- sorry, I can't even say it, emulsified
22 oxygen cream to production involved a patented technique or
23 a process. Is this process an expensive one, or is this a
24 very cheap kind of item to make?

25 A No. This is a very important point. The flip

1 side of having this -- advantage of having a patented
2 protection on an oxygen cream is this product is not
3 typical in the cosmetic space. It actually costs some
4 money to make this product. It has expensive ingredients
5 that have to be processed in a certain way, specifically
6 under oxygen pressure. And, in fact, the canister that we
7 put the cream in has to be kept under pressure; you can't
8 just store this product in a jar or a tube dispenser. So
9 the net effect of all that is the cost of goods to make
10 this product is significantly higher than traditional
11 creams and lotions.

12 Now, that cost barrier naturally pushes this
13 product -- in addition to its -- you know, the fact that
14 it's unique and you can't just get oxygen products on the
15 shelf, it pushes this product into a higher price point to
16 be viable from a business standpoint.

17 Q And can you tell me on a per-unit basis the
18 anticipated price point that the product would have to be
19 put at in order to cover the cost of goods or production
20 cost?

21 A I can estimate that. You know, we haven't done
22 scaled-up manufacturing of the product, but we'd be looking
23 for a wholesale price point, so the price we would charge
24 to distributors, we'd be looking for a wholesale price
25 point range of -- let's say, to put a window on it, 35- to

1 \$50 as a minimum for a one-ounce can of product. And
2 that's the wholesale price. The final retail price in the
3 cosmetic market is typically two times the wholesale price.

4 Q And this is based on your own research?

5 A Yes.

6 Q What is the target audience of your Oxium product?

7 A Well, with that framework, with the price point
8 necessarily being somewhat higher than something you would
9 find at a drugstore or a Target or a Wal-Mart, we really
10 view this product as more along the lines of what's called
11 a prestige product in the cosmetic business. And the
12 prestige market segment, the way I'm defining it, would
13 include very high-end department stores, specialty stores.

14 An example of a specialty skin care store would be
15 the mall retail outlet Sephora. And in particular a market
16 that really intrigued us in Southern California, where
17 we're located, a hot area for this is the professional and
18 dermatology segment, if you will. And that includes spas,
19 medi spas, where there are licensed aestheticians on staff
20 selling both services and high-end skin care products.

21 And is more and more common, dermatologic
22 practices, and, in fact, plastic surgery practices will
23 supply aestheticians in-house to supply these products and
24 services as part of the office business model.

25 Q So taking into account these particular markets

1 that you intend to and have, I presume, sold some of these
2 products, being a prestige market, who are your target
3 consumers?

4 A Well, our target consumers are women. That's
5 generally who buys these kinds of products in bulk. Women
6 who regularly purchase services and products from licensed
7 aesthetician-based services, people who go to spas, people
8 who go to dermatologic practices, plastic surgery offices.

9 It requires a little bit of disposable income of
10 the consumer to spend, and if I put an age range on that
11 type of consumer, we're talking about, broadly, age 30 to
12 60 or 65. The underlying assumption is that there's a
13 desire for anti-aging and cosmetic improvement procedures
14 on the part of the consumer.

15 Q Would you anticipate that the Oxium product would
16 not be sold in any particular markets?

17 A Well, it's completely unsuitable for mass market
18 retail based on the price point and the uniqueness of this
19 ingredient. There's a certain cache with having a unique
20 brand of ingredient, and it's our strong belief that
21 introducing it in a mass market, where profit margins would
22 be quite low, would absolutely compromise your ability to
23 market to these high-end businesses.

24 Q Would you anticipate that product, because of its
25 manufacturing costs, would ever be sold in a mass market

1 environment?

2 A It just is an illogical business practice to do
3 that. The profit margins would be low, and no amount of
4 volume sale would make up for what you'd be giving up in
5 the prestige segment.

6 Q Were you involved at all with the selection of
7 adoption of the Oxium name to be associated with
8 oxygenated -- I can't even say that word at all -- the
9 oxygen emulsified cream?

10 A Yes. My role as program manager, by default,
11 meant I had oversight over that process. And we had a
12 broad desire, when we started, to find out what consumers
13 liked and didn't like about the idea of having oxygen in a
14 cream, what perceptions they had and how we might play into
15 that prestige segment.

16 Q So now I'm focusing on the selection of the Oxium
17 name. Can you just describe briefly for me the process
18 that you went through to select that name.

19 A Sure. We had a general desire that the name of
20 the product be associated with oxygen, because that's its
21 significant ingredient, it's what makes it special. And
22 the actual mechanics of the process involved an iterative
23 name selection conducted both internally by our marketing
24 staff and employees. We did naming contests, we did
25 brainstorming sessions to determine a short list of

1 suitable names. Then we would submit those names for
2 opinion of trademarkability through our in-house IP
3 counsel. And after going through that iterative process a
4 couple of times, we had a short list of names, which
5 included the eventual mark Oxium along with a few others.
6 We had a marketing firm mock up some cans and labels, and
7 we tested those. We consumer tested those names and labels
8 and had a very favorable response to Oxium, which seemed to
9 convey oxygen in a positive light in a product that we
10 thought we could hit the prestige segment with.

11 Q In your selection of the Oxium name, were you at
12 any time aware of the brand Oxy, which is the opposer,
13 owned by the opposer in this particular proceeding?

14 A Yes, we were aware of the brand Oxy from the
15 outset of the project. And, really, from our standpoint,
16 it wasn't viewed at all as a competitive product, but we
17 were very concerned that we wanted to distance our product
18 from any kind of peroxidated cream or treatment. Oxy is,
19 of course, a mass-market, low-price-point, anti-acne
20 product, and if you want to sell a high-end cosmetic cream
21 for anti-aging, it's going to have a negative connotation
22 with that consumer if they associate it with a low-priced
23 anti-acne product that contains peroxides.

24 Peroxides in the prestige cosmetic base are also
25 used in products that purport to have oxygen benefits. An

1 example of this would be Peter Thomas Roth and Karen Herzog
2 brands. They have a high price point, but from our
3 perspective, that's highly misleading marketing, and we
4 wanted to distance ourselves from those products and from
5 Oxy because we felt there was a negative connotation there
6 of harshness in the product base to the consumer.

7 Q I think you named a couple products that you
8 believed to be competitive in that same --

9 A Yeah.

10 Q -- prestige market. Can you tell me what the
11 various competitive products, to your knowledge, would be
12 to the Oxium product.

13 A Sure. In that space I gave you two examples.
14 Now, technically, we found no other product that actually
15 contains oxygen in an elevated level as an ingredient, and
16 we have laboratory testing to back up that assertion.

17 Now, broadly, there are products that claim to be
18 associated with oxygen in the cosmetic arena. I mentioned
19 Peter Thomas Roth. That's kind of a broad brand. Karen
20 Herzog's kind of a broad brand. We found a few others.
21 One made by Luzern Laboratories. And Natura Bisse is
22 another company. More generally within that prestige
23 segment there are a number of brands that have been
24 developed up from physician offices, like Obagi and
25 Dr. Perricone's particular brand of product. All of these

1 we would view as potentially competitive.

2 Q And these are all products, again, that are found
3 in the prestige marketing channel that you previously
4 mentioned?

5 A Yes.

6 Q Let me show you some documents. I'll be
7 introducing some documents as exhibits. The first document
8 I'm going to show you is -- we're going to mark this
9 Exhibit No. 1.

10 (Applicant's Exhibit 1 was marked for
11 identification by the court reporter.)

12 BY MS. WOJCIECHOWSKI:

13 Q While you -- well, I'll just ask the question.
14 Are you familiar with what this document is?

15 A Yes.

16 Q What is this document?

17 A This document is our Oxium trademark application
18 that we filed some years ago which describes the class of
19 goods, the mark, you know, some basic information about the
20 company.

21 Q And can you tell me what products are named in
22 your trademark application for the mark Oxium?

23 A Yeah. So if I read through the goods and
24 services, we felt the mark was applicable for "Oxygenated
25 skin care preparations; namely, creams, masks, gels and

1 lotions for the face, hands, feet, and body, not including
2 acne preparations."

3 Q And to your knowledge, is Oxium an acne
4 preparation?

5 A No, Oxium is not an acne preparation.

6 (Applicant's Exhibit 2 was marked for
7 identification by the court reporter.)

8 BY MS. WOJCIECHOWSKI:

9 Q I'm going to turn to the next document, and it's
10 Bates stamped TherOx 396, as Exhibit No. 2, and ask you if
11 you know what this document is.

12 A Yes. This is an e-mail from one of our marketing
13 employees to the company. It was sent to all employees of
14 the company to solicit an opinion on potential names for
15 the cosmetic skin care brand, and this was part of the
16 iterative process I discussed for eventually arriving to
17 the mark Oxium.

18 Q So as of January 10th, 2002, you had a product but
19 you didn't yet have a name?

20 A Correct.

21 Q Moving to the next page of Exhibit 2 marked TherOx
22 397, were these the names that were being circulated for
23 potential adoption for this oxygenated product?

24 A At that time this was the first list of products
25 that was sent out for general opinion on suitability.

1 Q Was this internally conducted at TherOx?

2 A Yes. Yes, this was to TherOx employees.

3 Q And if you'll turn to the next page of Exhibit 2,
4 which is TherOx 398, do you know what this document is?

5 A I'll need a moment to read this over.

6 Q And, please, when I show you any document, please
7 take the time to review it, either refamiliarize yourself
8 with it, or, if you haven't ever seen it before, then be
9 sure to read it before you answer questions.

10 A I've seen the document. I'm sure I provided this.

11 Q And was this an e-mail again associated with this
12 project of finding a name for the oxygen skin care product?

13 A Yes. And there was some conversation between
14 company management. Like the end of the e-mail, "Paul"
15 refers to Paul Zalesky, TherOx founder and former
16 president. He expressed a disagreement into the particular
17 selection of names that were on previous exhibits, and so
18 there was a general thought of let's revisit the exact
19 positioning of the name.

20 Q And who is Amy DeWinter?

21 A Amy DeWinter was a former marketing specialist and
22 manager at TherOx, and she was the person directly
23 conducting the name search.

24 Q And did you collaborate with her during each step
25 of this name selection process?

1 A Yes. Yes, very closely.

2 Q The next page of Exhibit 2, TherOx 399 --

3 A Yes.

4 Q -- are you familiar with this document?

5 A I'll have to read it. Yeah, this e-mail, the top
6 of which was one that I sent to Amy DeWinter, it kind of
7 hits on some of the points already made in conversation
8 today. I'm expressing a certain amount of skepticism about
9 "Oxy" types of names that seem to connote that harshness of
10 anti-acne medications. And at the same time, we pinpoint
11 again the market where we're looking at the cream, derms
12 and skin care professionals, and at the same time we do
13 need an oxygen connotation.

14 Q Moving to the next document of Exhibit 2, TherOx
15 400, I'll ask if you're familiar with this document.

16 A This was sort of a long list of cosmetic products
17 that were in this professional prestige segment that Amy
18 DeWinter compiled to give everyone a flavor of what has
19 currently been accepted in that marketplace to calibrate
20 ourselves for an effective name search.

21 Q And turning to the next page of Exhibit 2,
22 document TherOx 401, is this just more of a continuum of
23 the discussion of the name selection in culling down your
24 list?

25 A I'll have to review this document. Anderson Jones

1 refers to an external marketing company that we got a
2 little bit of help from on the project. But the thought
3 was that, Hey, we can do the name in-house, we don't need
4 to hire an outside firm to do that. We thought we'd be
5 more effective to do that search internally and more cost
6 effective.

7 Q And I note toward the bottom of the page there's a
8 number of different potential names that are listed with a
9 number of them having "O2" in front of them. What is the
10 "O2" intended to represent?

11 A O2 is intended to present oxygen. The oxygen
12 molecule chemically is denoted by "O2," so that's simply
13 what it means.

14 Q And were any of these names selected for the
15 brand?

16 A No.

17 Q Turning to the next page of Exhibit 2 marked
18 TherOx 402, are you familiar with this document?

19 A Yes. There was some initial interest in a
20 potential mark O2Logics, "O2" connoting oxygen. However,
21 during our examination of trademarkability, we saw an
22 obvious conflict with an existing mark called Oxygen Logics
23 in the exact same class of goods.

24 Q Moving to the next page of Exhibit 2 marked TherOx
25 403, again, are you familiar with this document?

1 A I'll have to review it. It looks like another
2 short list of products that we were looking at in our
3 continued name search.

4 Q Moving on to the next document, TherOx 404, again,
5 this is just more of the discussion internally at TherOx of
6 the name selection process?

7 A Yes. This was an e-mail that I had sent to
8 Margaret Kivinski, our in-house IP counsel, to formally
9 look at the suitability of these three names.

10 MS. WOJCIECHOWSKI: And just for the record, we
11 have produced this document to Mentholum. By producing
12 this document, we do not intend or do waive any
13 attorney-client privileged communications.

14 Q Moving to the next document, which is two pages
15 marked TherOx 405 and 406 within Exhibit 2, if you'd take a
16 moment to familiarize yourself with both pages. Can you
17 tell me what this document reflects?

18 A So if you go to the initial e-mail, which is at
19 the bottom, I sent Margaret Kivinski another name to search
20 on Oxium, which of course we eventually branded. That name
21 was initially suggested to us by one of our employees, and
22 Oxium is -- or I was told it was the name of a legendary
23 material on Mars. So it's not a common word, it has an
24 oxygen connotation in the name, and we felt we had some
25 suitability here and perhaps an excellent chance at

1 trademarkability as well.

2 Q So basically this was your first introduction to
3 the name Oxium into the review process for selection of a
4 brand name?

5 A Yes.

6 Q And at the time that you reviewed the use of
7 Oxium, did you have any desire to have any connotation with
8 the Oxy brand that's owned by opposer in these proceedings?

9 A None.

10 Q And the next document marked TherOx 407 is a
11 continuum of Exhibit 2. Are you familiar with this
12 document?

13 A Yes. As we went further along in the process, we
14 started to arrive at a short list for consumer testing, and
15 these were considered the best choices, including Oxium.

16 Q Next document -- off the record a moment.

17 (Discussion off the record.)

18 BY MS. WOJCIECHOWSKI:

19 Q All right, going on to the next document, numbered
20 TherOx 409, familiarize yourself with the document and let
21 me know what that is.

22 A This was the communication between Amy DeWinter
23 and our outside groups that were going to conduct our
24 consumer testing of the names, and she was giving them some
25 instructions that they were originally set up to test three

1 names. We changed it to four.

2 Q And were you a recipient of this e-mail?

3 A Yes.

4 Q And the four names that were being reviewed were?

5 A The four names we were reviewing were Aeragen,
6 Oxium, Ingenue and Verdani.

7 Q And moving to the next document, 410, again, this
8 is just a continuation of the discussion concerning these
9 four --

10 A Yes.

11 Q -- names?

12 411, can you tell me what this document is?

13 A This is an e-mail from Amy DeWinter to our outside
14 marketing group, Anderson Jones, where she basically wanted
15 to make sure that there were no potential conflicts with
16 using the mark on the European continent, any potential
17 pitfalls in another language.

18 Q And were you a recipient of this e-mail?

19 A Yes.

20 Q Next document, 414, once you've had a chance to
21 familiarize yourself with this document, can you describe
22 to me what it is.

23 A Yeah, I'll need a moment to read this. This is an
24 e-mail from our outside marketing firm to myself and Amy
25 DeWinter concerning they're already thinking about how we

1 might use the Oxium mark going forward and securing the URL
2 to create a Web site, and possibly a phone number, and they
3 were anxious to get the process started with developing the
4 imagery for the brand.

5 (Applicant's Exhibit 3 was marked for
6 identification by the court reporter.)

7 BY MS. WOJCIECHOWSKI:

8 Q Moving on to the next exhibit, No. 3, Bates
9 numbered TherOx 379, I'll ask you to familiarize yourself
10 with this document, which goes from TherOx 379, 380, to
11 381.

12 A This is a memo that I sent to Kim Root. Kim Root
13 is a licensed aesthetician who worked with us first as an
14 employee, then as a consultant on the project. Kim had
15 direct sales experience working for Obagi Medical, so we
16 felt like she was a good person to represent us, and in
17 developing some Web site copy for the Oxium Web site that
18 we wanted to get up and running, I sent this memo to Kim
19 for her suggestions on the appropriateness of Web site copy
20 that, to my recollection, by and large I wrote there for
21 the Web site.

22 Q I direct your attention to following the heading
23 "The Science of Oxium" to the second paragraph, the next to
24 the last and last sentences of the second paragraph. You
25 state here that, "Through a patented process, oxygen is

1 dissolved into the specially formulated Oxium products,
2 which are packaged in pressurized cans that are designed to
3 keep the oxygen captured in solution until the cream is
4 dispensed for application." Is that the special canister
5 you were referring to earlier?

6 A Yes. That refers specifically to this very unique
7 dispensing can that we have.

8 Q And do you still agree with what you stated in the
9 last sentence there, "Oxium is not available in jars,
10 tubes, or sample packs because of the need to maintain the
11 product in a pressurized can"?

12 A Yes. That's the essential characteristic of the
13 product.

14 Q And going down to the last paragraph of that page,
15 TherOx 379, again, do you still agree with the first
16 sentence of that paragraph?

17 A Yes. It was very important to us to differentiate
18 a product that actually contains dissolved oxygen gas from
19 products that allude to oxygen effects when all they
20 contain is peroxides.

21 Q And if I move to the next page, TherOx 380, the
22 first full paragraph, which is just one sentence, do you
23 still agree with that statement?

24 A Yes. That's the most eloquent way to describe the
25 use of the product. It is a cosmetic product intended to

1 beautify and enhance the skin's appearance, and it speaks
2 directly to the marketing segment, "...available through
3 selected skin care professionals."

4 Q And then go down toward the bottom and see the
5 paragraph headed "Wound Healing."

6 A Yes.

7 Q Is that with reference to this other product line
8 that TherOx contemplated use of an oxygenated cream?

9 A Yes. I wouldn't even refer to it as a product
10 line; I'd refer to it as a project. We never intended to
11 market a wound version of the product. We wanted to
12 develop it, take it through some promising early-stage
13 clinicals, and then license that noncosmetic medical
14 technology to a third party. And it speaks to the fact
15 that that work was in fact funded by the Department of
16 Defense Advanced Research Projects Agency.

17 (Applicant's Exhibit 4 was marked for
18 identification by the court reporter.)

19 BY MS. WOJCIECHOWSKI:

20 Q Moving to the next document, Exhibit No. 4,
21 numbered TherOx 369 through 373, if you'll take a few
22 minutes and familiarize yourself with this document, I'm
23 going to ask you some questions concerning it.

24 A Okay. I'll need a few moments. Okay, I've had a
25 chance to skim over the memo.

1 Q What is this memo?

2 A This is a memo that I prepared internally for the
3 members of the project team at TherOx where we discussed
4 our Oxium test marketing initiative.

5 To give a little background on that, we received
6 some positive feedback on the cream both internally and
7 through focus groups and through people who we had
8 basically given the cream away to free, and we wanted to
9 see how product feedback would look when customers paid
10 money for the product in the business establishment where
11 we would eventually sell it, so we established a test
12 market in a handful of spas and physician offices. And I
13 make reference to seven sites, including four spas, two
14 plastic surgery suites, and a dermatology practice.

15 Sales, you know -- and if I refer to page -- let's
16 see. On 371 we were actively selling initially the night
17 cream product. At the bottom of the page in the table, one
18 ounce was selling for 45 retail, suggested -- I'm sorry, 45
19 wholesale, a suggested retail price of \$90. In fact, I
20 believe it sold for more than that at a couple of
21 establishments. And I basically lay out a structure by
22 which, throughout the document, we could expand the test
23 market, moving forward to either establish the foundation
24 for further business or to make it more attractive and a
25 partnering opportunity through a direct line of products,

1 et cetera.

2 Q I direct your attention on that same page, 371, to
3 the last sentence in the paragraph following the bullet
4 points and inquire, you said here, "Because the test market
5 is confined to the physician and spa market, no serious
6 conflict of interest is anticipated with potential mass
7 market license partners." What did you intend to mean by
8 that statement?

9 A Because cosmetic products are so heavily segmented
10 between different channels of trade, we didn't anticipate
11 any potential conflicts with actively marketing a product
12 in the same space as these mass market retailers.

13 Q At any point has TherOx contemplated actually
14 selling the Oxium product in a mass market environment?

15 A No. It's financially unsuitable for that. There
16 was a thought that a mass market licensed partner may want
17 a high-end professional product to complement their low-end
18 business.

19 Q And I believe you said earlier that the Oxium
20 product was available in a one-ounce can, but I see here
21 you're discussing in this memorandum the availability of a
22 four-ounce can.

23 A Yeah. In fact, I'm not sure if we sold any or
24 just tested samples. We did make some four-ounce cans.
25 The whole purpose of a four-ounce can is for professional

1 use, and this speaks to the market we were going to have.
2 Professional use basically means we would sell it -- it's
3 strictly a wholesale product to the spa where the licensed
4 aesthetician has a big can they can use to apply facials
5 and masks in office procedures. This four-ounce product
6 was not for one end consumer to take home. And that speaks
7 directly to this professional products segment. And some
8 other types of products were envisioned here.

9 (Applicant's Exhibit 5 was marked for

10 identification by the court reporter.)

11 BY MS. WOJCIECHOWSKI:

12 Q Turning to the next exhibit, No. 5, document
13 number TherOx 62, have you had a chance to review -- TherOx
14 63, sorry, a chance to review this page? Can you tell me
15 what it is?

16 A Yeah, this is copy from the Oxium.com Web site
17 that we put together. And I don't know if we iterated at
18 all from the memo that we discussed previously, but
19 basically the idea is to promote the Oxium brand through
20 the Web site and convey the message that we wanted to craft
21 for the product.

22 MS. WOJCIECHOWSKI: Leigh Ann, can we take five?
23 I need to go to the little girls' room.

24 MS. LINDQUIST: Oh, yeah, sure.

25 (Recess.)

1 (Applicant's Exhibit 6 was marked for
2 identification by the court reporter.)

3 BY MS. WOJCIECHOWSKI:

4 Q All right, back on the record. Moving to the next
5 document, Exhibit 6, TherOx 114-115, can you identify what
6 this document is?

7 A The picture on page 0114 is a picture of the
8 one-ounce Oxium can that we marketed in the test market
9 that was referred to commonly as the night cream.

10 Q And 115?

11 A 115 is the directions for use, the ingredients.
12 This appears directly on the can.

13 Q And so this is a depiction of how the Oxium brand
14 name is depicted physically on the product?

15 A Yes.

16 (Applicant's Exhibit 7 was marked for
17 identification by the court reporter.)

18 BY MS. WOJCIECHOWSKI:

19 Q Turning to the next Exhibit, No. 7, numbered
20 TherOx 340, 341, 342, 343, 344, and I'm reserving the
21 remaining two pages of Exhibit 7 separately for discussion,
22 can you identify for me what the content of 340 through 344
23 is.

24 A Yeah. Give me a moment just to look it over.
25 Okay, so this memo and attached survey are concerning the

1 test market that we conducted for Oxium that I mentioned
2 earlier when we were doing some previous documents.
3 Kim Root presented this to myself and Paul Zalesky as a way
4 of showing very good feedback on the product from our
5 initial test marketing experience and in this professional
6 high-end segment.

7 The survey which is attached to this was conducted
8 with -- this survey was for the licensed skin care
9 professionals on staff at these establishments. You know,
10 it was very important to us that we get the total buy-in of
11 the licensed professional that will ultimately be selling
12 this product to their clients at these businesses.

13 Q If you'll turn to page 342, and I'm just going to
14 direct your attention to question No. 6 and ask if you see
15 in that other -- the person taking this particular survey
16 wrote in the words "acne treatment."

17 A Yes.

18 Q Did you ever produce any acne treatment products
19 under the Oxium brand?

20 A No. That would be against federal law. Oxygen is
21 not approved for use as an anti-acne medication. We wanted
22 to steer clear of any connotation whatsoever that the
23 product was used as a drug. Anti-Acne products are all
24 approved drugs.

25 Q I'm turning your attention to the remaining two

1 pages of Exhibit No. 7 and ask if you know what this
2 document is.

3 A This looks like our tri-fold pamphlet that -- we
4 produced a tri-fold pamphlet to give out with the products
5 at the spas, salons, and physicians' offices where we were
6 conducting the test market that gives them a little bit of
7 basic information regarding the product and its use.

8 (Applicant's Exhibit 8 was marked for
9 identification by the court reporter.)

10 MS. WOJCIECHOWSKI:

11 Q Moving now to Exhibit No. 8, document numbered
12 TherOx 174, and it's a fairly large document, through
13 TherOx 197, I'll ask if you're familiar with this document.

14 A Yes. We made a strategic business decision that
15 we wanted to pursue a licensing of our oxygenated emulsion
16 technology to interested outside firms. To achieve that
17 end, we engaged in a business contract with Burnham
18 Securities of New York, New York City, to act as our broker
19 or agent in contacting potential license partners.

20 It is very common, when pursuing this type of
21 arrangement, to assemble what is referred to as "the book,"
22 and the book is what is found in Exhibit 8. Exhibit 8 is a
23 potpourri of all kinds of information related to the
24 oxygenated emulsion project both in the cosmetic use of the
25 product under the brand name Oxium and under the

1 nonbranded, noncommercial potential future medical uses of
2 the product as well.

3 Q Turn your attention to the same document, the page
4 numbered TherOx 180, and I'll turn your attention to the
5 fifth paragraph below the quotations and ask --

6 MS. LINDQUIST: Can you identify which paragraph
7 you guys are talking about?

8 MS. WOJCIECHOWSKI: Yeah. The paragraph that
9 begins with "In addition."

10 Q If you'll read that paragraph and tell me what
11 your understanding of Burnham's discussion here to be.

12 A Sure. "In addition, medicated skin creams,
13 particularly the anti-acne OTC market, represents a
14 realizable opportunity based upon initial results from a
15 pilot acne trial with the TherOx emulsion. Critically
16 important to these market segments would be the Sustainable
17 Competitive Advantage that the AOE technology will give to
18 the chosen market participants."

19 What Burnham is referring to here is a potential
20 licensing opportunity for the general emulsion technology
21 for medical use, particularly as envisioned as an anti-acne
22 product. This potential market play would not be with
23 Oxium or the cosmetic product associated with the brand but
24 rather the medical noncommercial product that we conducted
25 a limited acne study with. I think the results of that

1 study are somewhere in this document. Burnham felt that we
2 should include any potential information we have regarding
3 the technology, so one page might be a cosmetic reference,
4 the next page might be a medical reference within this
5 document.

6 Q So the AOE technology, what does that reference?

7 AOE is an acronym for aqueous oxygen emulsion. I
8 referred to it as the topical oxygenated emulsion, which
9 doesn't lead to a flattering acronym, so AOE was chosen
10 here.

11 Q So in this discussion of the use of the AOE
12 technology in an acne-related product, this was not -- I'm
13 just confirming that this was not intended to be used under
14 the Oxium-branded name.

15 A No, it's a completely separate project to explore
16 medicinal use. Again, we want to emphasize that cosmetic
17 products, by definition, do not contain drug claims, and
18 anti-acne products are FDA-approved drugs.

19 (Applicant's Exhibit 9 was marked for
20 identification by the court reporter.)

21 BY MS. WOJCIECHOWSKI:

22 Q Moving on to the next exhibit, No. 9, TherOx
23 document No. 337 and 338, I'll ask you to familiarize
24 yourself with that document.

25 A This is an earlier memo that I prepared than some

1 of the previously discussed ones that talk about the
2 initiation of our Oxium test market and how, logistically,
3 we'll handle the product roll-out initially as free samples
4 before transitioning to sales, et cetera.

5 Q Turning your attention to the last paragraph on
6 page 338 and asking you to discuss what your concerns were,
7 if there were any, on the legal side of things.

8 A On the legal side, and I'll read the sentence in
9 question here, we say that "No legal or contractual
10 impediments are anticipated that would delay product
11 release. The few remaining tasks to be completed prior to
12 release include the filing of patent applications for the
13 emulsion, expected in late December, and possibly obtaining
14 a noninfringement opinion on the Oxium trademark with
15 respect to previous filings for Oxy trademarks by
16 SmithKline Beecham."

17 Q And did you obtain any such opinion?

18 A I believe that we did, although I don't remember
19 obtaining -- I don't -- no, I don't remember if we obtained
20 them.

21 Q Did you have any specific concerns about any Oxy
22 trademarks owned by SmithKline Beecham?

23 A No, this would have been something that would have
24 been raised potentially by our IP department. I didn't
25 have any particular personal concerns over it.

1 (Applicant's Exhibit 10 was marked for
2 identification by the court reporter.)

3 BY MS. WOJCIECHOWSKI:

4 Q Moving to the next document, Exhibit 10, and it's
5 page number TherOx 520 through 533, tell me if you're
6 familiar with this document.

7 A Okay, I'll need a few moments to review. Okay,
8 these are handwritten notes that I took regarding both some
9 background on the names and then some notes I took from
10 individual feedback from focus group participants. And
11 there's at least a couple of examples in this grouping on
12 the suitability of certain names and what we'd like to see
13 conveyed in an oxygen product.

14 Q And, again, was it important to you that the
15 product name convey the oxygen component of the emulsion?

16 A We thought it was critically important.

17 (Applicant's Exhibit 11 was marked for
18 identification by the court reporter.)

19 BY MS. WOJCIECHOWSKI:

20 Q Moving next to Exhibit No. 11, TherOx 494 and 495,
21 and I'll ask if you can identify what this document is.

22 A These are some examples of competitive brands and
23 ingredients that play into this specialty, prestige,
24 high-end skin care market. Seems to be very popular to
25 have a very hot ingredient, a very exclusive ingredient,

1 and that will support a high price point for the product.
2 It's a business model that's been used efficiently.

3 We mentioned Obagi before. Obagi makes this list
4 with hydroquinone and other ingredients. There are other
5 brands and associated ingredients that were considered at
6 the time, very hot and relevant in high-end.

7 (Applicant's Exhibit 12 was marked for
8 identification by the court reporter.)

9 BY MS. WOJCIECHOWSKI:

10 Q Turning to the next document, Exhibit No. 12,
11 TherOx 548 through 551, I'll ask that you review this
12 document. And if you do recognize this document, give me a
13 description of what it is.

14 A I'll just need a moment to review. Okay, so
15 page 548 is a memo that Amy DeWinter prepared for myself
16 and some other key management members that summarized how
17 the brand name Oxium had been selected after we had, as
18 we've discussed here today, narrowed down the list of four
19 names. An outside marketing group put those names forward
20 with mock labels to focus group participants that we had
21 engaged in previously before there was any name for the
22 technology, and Oxium tested well and was considered the
23 best choice.

24 Q I want to direct your attention to the sentence in
25 the middle of the second paragraph that says, "Aeragen

1 tested most favorably overall, with Oxium as a strong
2 second." Is there any reason why the name Aeragen was not
3 selected instead of Oxium?

4 A Yes. In parallel with name selection, a
5 trademarkability review considered Aeragen to be a much
6 stronger risk than Oxium, and, therefore, Oxium has chosen
7 in that light as the brand.

8 Q And looking at pages 550 and 551, is this a
9 separate document from the prior pages?

10 A Yeah, this is a separate document. This isn't
11 part of that memo. Page 549 is a spreadsheet that I
12 believe I put formally together to quantitate the
13 preferences of some of these focus group participants.
14 Pages 550 and 551, once Oxium was selected as the brand of
15 choice, we put together a project input page for the
16 external marketing firm responsible for developing the
17 imagery for the can and brand.

18 And in the product positioning segment I wanted to
19 emphasize that we were very clear with the marketing firm
20 that this product will be positioned as a prestigious skin
21 care product and this type of positioning is not compatible
22 with the mass market.

23 Q Okay, if you'll look on page 551, see there that
24 you said a mandatory inclusion tagline must be related to
25 oxygen. What was that with reference to?

1 A We wanted a tagline associated with Oxium, you
2 know, sort of a one-liner to appear under the name very
3 prominently, and we felt very strongly about the
4 association of oxygen with the brand, and that particular
5 tagline for Oxium is "Skincare Through Oxygen Science," so
6 we try to connote a strong message there.

7 (Applicant's Exhibit 13 was marked for
8 identification by the court reporter.)

9 BY MS. WOJCIECHOWSKI:

10 Q So turning then to page -- I should say to
11 Exhibit 13, pages 750, 751, 752, if you'll take a moment to
12 review those and tell me what this references.

13 A Pages 751 and 752 are some of the product mock-ups
14 that were used in our consumer tests of this short list of
15 four names. And you'll see that all four of the names that
16 we've discussed are on those pages. The final copy that we
17 use for the product container in the brand is found on
18 page 750, and it's labeled "final copy." It's hard to
19 make out the tagline under Oxium, but it says, "Skincare
20 Through Oxygen Science," as we just discussed.

21 (Applicant's Exhibit 14 was marked for
22 identification by the court reporter.))

23 BY MS. WOJCIECHOWSKI:

24 Q Turning to the next exhibit, No. 14, TherOx
25 documents 755 through 769, do you know what these documents

1 are?

2 A Let me familiarize myself with them. Okay, these
3 documents represent individual invoices to the various test
4 market sites that we chose to do a limited introduction of
5 the product. And following the initial free dispensation
6 of product, we sold the one-ounce cans that we've seen the
7 product mock-ups for a price of 45 wholesale to these
8 establishments for their retail use.

9 Q So on the invoice 760, referencing "item number,
10 Oxium night cream, shipped 1," what does "1" reference in
11 this particular order?

12 A "1" represents one case of 12 individual cans. So
13 12 cans times \$45, you arrive at the \$540 invoice.

14 Q So if you'll turn to page 766, you'll see a
15 "shipped .5" I assume that's half a case.

16 A Half a case, correct, six cans.

17 (Applicant's Exhibit 15 was marked for
18 identification by the court reporter.)

19 BY MS. WOJCIECHOWSKI:

20 Q Turning next to Exhibit No. 15, which consists
21 solely of documents Bates stamped OPP00024 and 00028, I'll
22 ask if you can identify what the depicted products are.

23 A I'll need a moment to review. The first document,
24 00024, appears to be a compilation of the Oxy products for
25 use in facial and anti-acne care.

1 The second document appears to depict these
2 products' placement on a mass market retail shelf.

3 Q That will be all of the exhibits that are
4 introduced in this deposition, but I am going to make
5 reference in questioning without revealing the document to
6 the deponent. For learned counsel's reference, these are
7 documents previously identified in opposer's testimony
8 deposition of Mr. Jim Brown as Exhibit No. 12, and they are
9 Bates numbered OPP00196 and OPP00197.

10 MS. LINDQUIST: I think the second page was
11 actually an exhibit in Bob Cantrell's deposition.

12 MS. WOJCIECHOWSKI: Okay. But you have no
13 objection to me making reference to these documents without
14 showing the deponent?

15 MS. LINDQUIST: Right.

16 MS. WOJCIECHOWSKI: For purposes of questioning
17 only.

18 Q I'm just going to ask you a couple quick questions
19 concerning places where you would anticipate having any
20 advertising appear for the Oxium products. Would you ever
21 anticipate any advertising placement by TherOx for the
22 Oxium product in a publication called Cosmo Girl?

23 A No.

24 Q In a publication called DC Comics?

25 A No.

1 Q In a publication called E-l-l-e Girl?

2 A No.

3 Q In a publication called Scholastic Teen?

4 A No.

5 Q In a publication called SI For Kids?

6 A No.

7 Q In a publication called Teen People?

8 A No.

9 Q In any cable or Internet placement on Teen Cable?

10 A No.

11 Q In a printed publication called Sports Illustrated
12 For Kids?

13 A No.

14 Q In any printed publication called Transworld -
15 Ride BMX?

16 A No.

17 Q In any publication called Transworld -
18 Skateboarding?

19 A No.

20 Q In any printed publication called Transworld -
21 Motocross?

22 A No.

23 Q In any printed publication called MAD Magazine?

24 A No.

25 Q In any printed publication called Future

1 Skateboarding Buyers Guide?

2 A No.

3 Q In any printed publication called Future
4 Snowboarding?

5 A No.

6 Q In any publication called DC Comics?

7 A No.

8 Q In a television advertising on Comedy Central?

9 A No.

10 Q Any television advertising on MTV?

11 A No.

12 Q Any television advertising intended to reach the
13 teen audience?

14 A No.

15 MS. WOJCIECHOWSKI: I think I'll take about five
16 to make sure I've covered everything, but I think I might
17 be done. We're putting you on mute.

18 (Recess.)

19 (Applicant's Exhibit 16 was marked for
20 identification by the court reporter.)

21 BY MS. WOJCIECHOWSKI:

22 Q I'm going to introduce one more document, the last
23 final Exhibit, No. 16, and ask you to take a look at it. I
24 don't have a Bates number, but it is a letter dated June 7,
25 2002, from Gary Krugman, who's with opposer's law firm,

1 which is spelled S-u-g-h-r-u-e, new word Mion. `

2 It's actually a document you gave to us, TherOx
3 0135 and 0136.

4 MS. LINDQUIST: Okay.

5 BY MS. WOJCIECHOWSKI:

6 Q I'll ask if you've ever seen this document before.

7 A I believe, after reviewing the document, that I
8 did see this several years ago after it was transmitted to
9 Margaret Kivinski.

10 Q And because of the date being June 7, 2002, does
11 that have any impact on your review of Exhibit No. 9,
12 TherOx 337 and 338?

13 A Yes. So this memo that I wrote on November 20th,
14 2002, having a sentence under the legal portion of that
15 document on page 338 which refers to obtaining a
16 noninfringement opinion on the Oxy trademark with respect
17 to previous filings for Oxy by SmithKline Beecham, I'm sure
18 I inserted that sentence in reference to that letter. I
19 couldn't remember those details before reviewing the
20 letter.

21 Q At any time before receiving this letter at that
22 time from the owner of the Oxy mark, SmithKlineGlaxo -- I'm
23 sorry, SmithKline Beecham, did you have any concerns with
24 any infringement by the use of the Oxium trademark with
25 respect to the Oxy trademark owned by SmithKline Beecham?

1 A No.

2 MS. WOJCIESHOWSKI: Okay, that will do it for us
3 and our testimony deposition. We will open for
4 cross-examination by Mentholum's attorney.

5

6 EXAMINATION

7 BY MS. LINDQUIST:

8 Q Okay, let's go back and talk about the Oxium
9 product a little bit.

10 MS. WOJCIECHOWSKI: Can you speak up a little bit?

11 BY MS. LINDQUIST:

12 Q Let's go back and talk about the Oxium product.
13 And if you'll go to Exhibit 3, on the first page, the third
14 paragraph, you mentioned that it's not available in jars,
15 that it's only available in pressurized cans, right?

16 A Yes.

17 Q Is it possible to put a gel in a pressurized can?

18 A Yes. Let me give you a little bit of technical
19 explanation of our product canister. It's very unique and
20 not something that every consumer has handled in the
21 cosmetics placement. It's what we call an indirect aerosol
22 can. The product is in an aerosol can in that there's
23 pressurized gas in the container that propels the product,
24 but the pressurized gas is inert and it surrounds a
25 gas-impermeable baggy that actually contains our liquid

1 product to dispense. So unlike a traditional aerosol can,
2 the aerosol gas is not in contact with the product and is
3 not dispensed with the product, so this type of can can be
4 used on any type of liquid formulation in order to store it
5 under pressure.

6 Q And then going back to Exhibit 2, the last page of
7 that exhibit, which is marked TherOx 0414, the second
8 paragraph there says, "When you get a chance, could you go
9 to www.oxygenbotanicals.com and review their marketing
10 story to see how this might relate to what we want to or
11 can say about Oxium." Can you tell me what oxygen
12 botanicals is in 2002 and what you were going to take from
13 their marketing story?

14 A I can't remember that Web site or if I reviewed
15 it.

16 Q Did you use anyone else's marketing story to come
17 up with the information that you introduced in your
18 exhibits here as indicating that it comes from the Web site
19 that you maintain at Oxium.com?

20 MS. WOJCIECHOWSKI: Objection. Argumentative.

21 You can answer.

22 BY MS. LINDQUIST:

23 Q You can answer the question.

24 A No.

25 Q How did you develop the information that's at

1 Oxium.com?

2 A Internally at TherOx.

3 Q Did you refer to any materials of competitors when
4 you were developing that material?

5 A Not that we're aware of.

6 Q I've got a question about Exhibit 4. The third
7 page in it is 371. And we talked about this, or you
8 discussed this a little bit, the test market for the
9 physician and spa market, and you don't anticipate a
10 conflict with a potential mass market license partner.
11 When you were discussing this particular sentence, which is
12 in the first full paragraph of that page 371, you mentioned
13 that you might want to partner with someone who offers a
14 low-end product and a complement to that would be a
15 high-end product. What did you mean by that?

16 A Oh, it's quite simple. If a mass market retailer
17 wants a -- you know, our impression is that -- I'll give
18 you a brand example, Neutrogena. Neutrogena sells
19 mass-market products. They have been actively looking for
20 something they can transition to the prestige channel
21 because they want higher profit margins. They can't do
22 that at the mass level, so our feeling was maybe these
23 traditional mass-market companies would want to acquire a
24 product they can market in these high-end cosmetic
25 channels.

1 Q Moving to Exhibit 7, you said that the last pages
2 of that -- or I guess the middle pages, 341 through 344,
3 that was a survey. Is this just a sample? Were there
4 other surveys that were like this one?

5 A Yes. This looks like one person's survey that
6 they filled out.

7 Q And then when we looked at Exhibit 8, we
8 specifically looked at page 0180. You mentioned there was
9 a pilot acne trial. Can you tell me a little bit about
10 that trial?

11 A Yes. With the other arm of the project concerning
12 nonmarketed, nonbranded use of the emulsion for medical
13 purposes, we sent a number of oxygenated cream samples that
14 were formulated in a way that we thought might be effective
15 in anti-acne and we conducted a 10-person study with a
16 leading dermatologist to determine if there was any benefit
17 to that.

18 Q Were the ingredients in those trial products
19 identical to the ingredients in the Oxium product?

20 A No.

21 Q How were they different?

22 A Well, the base formulation was different. It did
23 have an elevated level of oxygen.

24 Q And that's where the similarity is between that
25 particular trial product and the Oxium product?

1 A Yes.

2 Q And then on that same page below that paragraph
3 that talks about the pilot trials, there's a figure 1, and
4 it says "Skin Care," which seems to encompass facial care,
5 body care, hand care, and then "Sun Care" sort of in its
6 own little area. Where does acne appear on this bar chart?

7 A There is no bar chart for acne. Again, I want to
8 emphasize that Exhibit 8 is the book prepared by Burnham
9 Securities for the entire envelope of the emulsion
10 technology, so it's somewhat confusing to read through it
11 and find that one page or one paragraph might be medical
12 followed by cosmetic or maybe even a mixture of the two,
13 and insofar as the material refers to cosmetics, that would
14 apply to the Oxium brand.

15 Q So when you say that acne products are regulated
16 by the FDA, what exactly do you mean by that?

17 A They're specifically regulated as drugs.
18 Cosmetics are regulated too, but in order to make a product
19 claim on your label that says product X can be used to
20 treat acne, the ingredient -- the active ingredient, as I'm
21 sure you know, the Oxy containers have an active, anti-acne
22 ingredient, it has to be established for that purpose.
23 Oxium contains no ingredient that's been established as an
24 anti-acne ingredient by the FDA, so labeling the product
25 that way would violate the Food, Drug, and Cosmetic Act.

1 Q Moving to Exhibit 10, you said that these were
2 notes that you took and some of them stem more from focus
3 groups. So, for example, the pages that are marked 523
4 through 524, at the top it says, "Becky, female, age 29."

5 A Yes.

6 Q Correct me if I'm wrong. I'm assuming you would
7 be at the focus group and Becky, age 29, was one of the
8 women at the focus group and it was a discussion and you
9 just took those notes as she was responding to questions.
10 Was there a power point used in the focus group, or was it
11 an oral conversation?

12 A I don't remember the exact details. I think it
13 was oral communication, you know, where the moderator had
14 more or less a cue card of issues.

15 Q Did the participants have cue cards?

16 A I don't remember the participants having any
17 materials in front of them.

18 Q All right. And then Exhibit 11, these are medical
19 skin care lines, and then it has ingredients.

20 A Yes.

21 Q Are any of these ingredients recognized for use in
22 acne care?

23 A Salicylic acid is used as an anti-acne product.

24 Q What about retinol?

25 A I have no direct knowledge.

1 Q Is retinol used to treat -- or as an anti-aging
2 ingredient?

3 A Very commonly so.

4 Q Even though Oxium apparently can't be labeled as
5 an acne product, in your opinion would use of Oxium help
6 someone with their acne, could it?

7 A Potentially. I have no direct data to support
8 that.

9 Q But potentially it could?

10 MS. WOJCIECHOWSKI: Speculative.

11 You can answer.

12 THE WITNESS: Potentially, yes.

13 BY MS. LINDQUIST:

14 Q Are the ultimate end users of the Oxium product,
15 not the skin care professional but the person that actually
16 gets it on their face, are they told not to use any other
17 products but the skin care product?

18 MS. WOJCIECHOWSKI: Hearsay.

19 BY MS. LINDQUIST:

20 Q You can answer the question.

21 MS. WOJCIECHOWSKI: Lack of personal knowledge, no
22 foundation.

23 BY MS. LINDQUIST:

24 Q When you market these Oxium products to skin care
25 professionals, do you tell the skin care professional that

1 the end user is not to use any other skin care products
2 except Oxium?

3 A No, we don't give them that instruction.

4 Q Is there any sort of printed information that you
5 give to a skin care professional that says that?

6 A No.

7 Q Have you ever used the Oxium product?

8 A In the laboratory, yes.

9 Q Have you used it on yourself?

10 A Yes. In a laboratory setting.

11 MS. WOJCIECHOWSKI: You're getting a guy to admit
12 to this here.

13 THE WITNESS: I do not have substantial wrinkling,
14 so I'm blessed in that regard.

15 BY MS. LINDQUIST:

16 Q I'm sorry for asking a question like that. I'm
17 sorry.

18 You maintain a Web site at Oxium.com.

19 A Yes.

20 Q What sort of information do you have on that Web
21 site regarding marketing for the Oxium product?

22 A I'd have to review the exhibit again which shows
23 the copy.

24 MS. WOJCIECHOWSKI: It would be Exhibit No. 5. To
25 the extent that that's -- two pages.

1 THE WITNESS: Yeah, the information is not --
2 there's not a lot -- it has very basic information about
3 who TherOx is and what TherOx does and that Oxium contains
4 a great deal of oxygen and that that's unique and the fact
5 that we have oxygen contained in the cream is something
6 that is very different from other products.

7 BY MS. LINDQUIST:

8 Q So at the top of this it looks like there are
9 things you can click on, and one of those areas is "Find A
10 Specialist." Do you see that at the top of the page?

11 A Yeah, I think there was a place holder for that.

12 Q So if I clicked on that, would that take me to
13 find a skin care professional?

14 A You know, I'd have to click through the menus
15 specifically to speak to that. The Web site was set up
16 with an eye toward further ramp-up in this activity, which
17 did not materialize.

18 Q Are there plans to further develop the Oxium.com
19 Web site?

20 A We have no current plans to expand the Web site.

21 Q Is the Oxium product available anywhere today?

22 A I would say that as of today, the limited test
23 market is not activity active. We've probably had one or
24 two direct sales of product this calendar year.

25 Q Does TherOx intend to continue trying to market

1 Oxium in 2007?

2 A Therox has no definitive plans to directly market
3 Oxium in 2007 as of today.

4 Q The companies that previously ordered the product
5 that we saw in Exhibit 14, the invoices, none of those
6 companies are currently ordering product?

7 A The last order that we had, and I'm not certain of
8 the date, was in fact by one of these companies. I don't
9 know if the latest invoice was included. Because of other
10 strategic business decisions, we would not fulfill an order
11 placed today.

12 Q Okay. I don't have that much more, I promise.
13 Exhibit 12, page 550, the project input, one of the
14 features of the product is, No. 3, the formulas are oil
15 free. Why is that important to mention or why was it
16 important to mention?

17 A The idea behind that is that the product is not
18 overly greasy feeling to the skin.

19 Q Was there any additional reason to include that
20 information, for example, that it wouldn't cause
21 break-outs, acne break-outs, in a user?

22 A No, we weren't focused on acne or anti-acne
23 potential at that time.

24 Q At the beginning of your deposition you mentioned
25 a competitor, Dr. Perricone. Can you spell that for me,

1 Perricone?

2 A P-e-r-r-i-c-o-n-e.

3 Q And what brands do they market their products
4 under?

5 A I can't remember the specific brand, but it's a
6 very successful story of a physician who came up with not
7 only this line of skin care products but he extended it
8 into diet and nutrition for healthy skin. It speaks to
9 this prestige channel, building it from the grassroots up.

10 Q Would you consider Arbonne to be a competitor?

11 A I have no direct knowledge of that brand.

12 Q So right now does TherOx have a continued intent
13 to offer oxygenated skin care preparations, namely creams,
14 masks, gels, lotions for the face, hands, feet, and body?

15 A Yes. But the business path is not well defined
16 right now.

17 Q What do you mean by that?

18 A We have active discussions ongoing to potentially
19 license the Oxium brand and technology. And of course our
20 option is always open to resume marketing ourselves if the
21 licensing discussions don't lead to a signed agreement.

22 (Whereupon the following testimony is deemed
23 confidential and contained in a separate volume
24 of the transcript.)

25 //

1 (Whereupon nonconfidential portion of transcript
2 is resumed.)

3 MS. LINDQUIST: Okay. I don't think I have
4 anything else.

5 MS. WOJCIECHOWSKI: And I have no follow-up.

6 MS. LINDQUIST: Okay.

7 MS. WOJCIECHOWSKI: So do we want to handle this
8 where the original transcript will be sent to counsel for
9 TherOx, and I will have the deponent review it, if he has
10 any changes or comments, we will put those on a sheet and
11 send the original signed -- actually say I will submit the
12 original signed deposition to the Trademark Trial and
13 Appeal board and send a copy to counsel for Mentholum
14 within 30 days.

15 MS. LINDQUIST: Yes.

16 MS. WOJCIECHOWSKI: After receipt from the court
17 reporter.

18 MS. LINDQUIST: Yes. When he's had a chance to
19 review it.

20 MS. WOJCIECHOWSKI: So that concludes this
21 deposition. Thank you for your appearance today.

22 MS. LINDQUIST: And thank you very much for
23 changing the time for me. I very much appreciate that.

24 MS. WOJCIECHOWSKI: The deponent will sign the
25 deposition under penalty of perjury along with any changes

1 or comments that he might have for such transcript.

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Witness: Jeffrey Creech

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I, JEFFREY CREECH, do hereby declare under penalty of perjury that I have read the foregoing transcript; that I have made any corrections as appear noted, in ink, initialed by me, or attached hereto; that my testimony as contained herein, as corrected, is true and correct.

EXECUTED this _____ day of _____,
_____, at _____, _____.
(City) (State)

JEFFREY CREECH

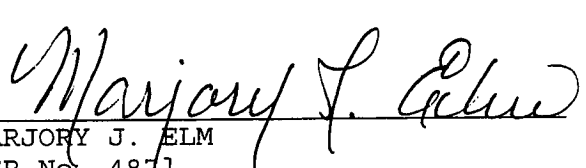
I, the undersigned, a Certified Shorthand Reporter of the State of California, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were placed under oath; that a verbatim record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; further, that the foregoing is an accurate transcription thereof.

I further certify that I am neither financially interested in the action nor a relative or employee of any attorney of any of the parties.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: JAN 03 2007


MARJORY J. ELM
CSR No. 4871



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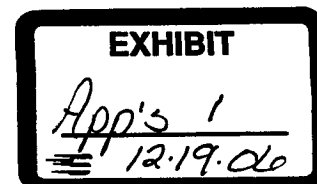
Record 1 out of 1

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(TARR contains current status, correspondence address and attorney of record for this mark.
Use the "Back" button of the Internet Browser to return to TESS)

Typed Drawing

Word Mark	OXIUM
Goods and Services	IC 003. US 001 004 006 050 051 052. G & S: Oxygenated skin care preparations, namely, creams, masks, gels and lotions for the face, hands, feet and body, not including acne preparations
Mark Drawing Code	(1) TYPED DRAWING
Serial Number	78116976
Filing Date	March 22, 2002
Current Filing Basis	1B
Original Filing Basis	1B
Published for Opposition	February 3, 2004
Owner	(APPLICANT) TherOx, Inc. CORPORATION DELAWARE 2400 Michelson Drive Irvine CALIFORNIA 926121310
Attorney of Record	Margaret A. Kivinski
Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

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TherOx0030

Jeff Creech

From: Amy DeWinter
Sent: Thursday, January 10, 2002 12:10 PM
To: AllEmployees
Subject: O2 Skin Care: Product Name Selection

Hello, Fellow TherOx Troopers!

Attached is a form for you to vote on your favorite potential product name for the Oxygen Skin Care Products. Please select one name by checking the box next to your favorite. Also, please add your comments as to why you chose that name. Make sure you put your name on the form as well. Let me know if you have any questions.

Please return this form to me no later than **5 p.m. on Monday, January 14th.**

Thanks!

-Amy

EXHIBIT

App's 2
12-19-06

TherOx0396

2/7/02

Cosmetic Name Selection

Please vote on your favorite name of those listed. Select only one. Please add below why you selected this name as your favorite, and feel free to share information on why you didn't choose any of the others.

☐ O₂ Essentials

☐ O₂F_x

☐ DermOx

☐ Oxygenesis

☐ Oxology

☐ Derm affect

☐ Oxygentle

☐ Oxmosis

☐ Oxygenuine

Comments:

Your name:

Jeff Creech

From: Amy DeWinter
Sent: Monday, January 14, 2002 7:57 AM
To: Jeff Creech; Kim Root
Subject: FW: emulsion name

CosmeticNameSelectio

n.doc

From Paul. Some internally feel we should pick a more "cosmetic" (pardon the pun) name. I feel that our product marketing strength is in the medical backing, and therefore vote for a more scientific (and oxygen-related) name. If you both share my philosophy on this, can we discuss this morning? I'd like to compose a little email (with your backing) to Paul to explain.

Kim: perhaps we can compose a list of competitive names, from multiple distribution channels, for Paul and Linda to see. I have noticed that many lines have adopted more clinical sounding names (i.e., Pure O2 from Avon).

Thanks.

-----Original Message-----

From: Zalesky@aol.com [mailto:Zalesky@aol.com]
Sent: Sunday, January 13, 2002 7:01 PM
To: adewinter@therox.com
Subject: emulsion name

Amy

I really did not like any of these for consumers / I believe you are thinking medical specialty.

Linda D agrees with my sentiment.

Paul

Jeff Creech

From: Jeff Creech
Sent: Monday, January 14, 2002 9:10 AM
To: Amy DeWinter
Subject: RE: emulsion name

Amy,

I agree with you that the product should have a name with some medical connotations. Our market efforts are geared such that derms and other skin care professionals will be selling the cream. Also, other lines such as Obagi and Perricone (sp?) shamelessly tout the fact that their founders are physicians. The only reason to buy a skin cream with highly concentrated oxygen is the consumer belief that O2 has some palpable effect on their skin. Why fight the feeling?

That being said, with O2Fx out of the running, I'm not too excited about any of the remaining names. "Oxy-" screams anti-acne medication, and "Ox" is practically shouting Paul Bunyan.

Jeff

-----Original Message-----

From: Amy DeWinter
Sent: Monday, January 14, 2002 7:57 AM
To: Jeff Creech; Kim Root
Subject: FW: emulsion name

From Paul. Some internally feel we should pick a more "cosmetic" (pardon the pun) name. I feel that our product marketing strength is in the medical backing, and therefore vote for a more scientific (and oxygen-related) name. If you both share my philosophy on this, can we discuss this morning? I'd like to compose a little email (with your backing) to Paul to explain.

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To: adewinter@therox.com
Subject: emulsion name

Amy

I really did not like any of these for consumers / I believe you are thinking medical specialty.

Linda D agrees with my sentiment.

Paul

Jeff Creech

From: Amy DeWinter
Sent: Wednesday, January 23, 2002 11:20 AM
To: Jeff Creech; Kim Root; Kevin Larkin; Paul Zalesky; Rob Weigle
Cc: Linda D'Abate; Karen Jones (E-mail)
Subject: Competitive names

Some competitive product names for comparison. You'll see the medical influence I was referring to yesterday in the meeting with Andersen Jones.

- Biomedic (kinda cool)
- Cellex C
- Decleor
- Dermalogica
- Essential Care
- ExCel
- Exuviance
- Ferndale (awful!)
- Galderma (equally bad!)
- Gly Derm
- Gly Tone
- GM Collin (sounds like a car)
- kinerase
- MD Forte
- MD Formulations
- Neostrata
- Neova
- Nioxin
- Obagi
- Pedinol (another bad one!)
- Pevonia
- Physician's Choice
- Phytomer
- Refinity (kinda cool)
- Retinol
- Revision
- ROC Dermatologic
- Skin Therapy
- Skinceuticals (I like this one)
- Sothys (Ah, "so this" now!)
- Stiefel (if this is pronounced how I think it is, IT'S AWFUL!)
- Summers
- SuperSkin
- Topix
- Vanicream ("Use it on pesty significant others, too!")
- Wellskin
- Yon-Ka (Yikes!)

Jeff Creech

From: Amy DeWinter
Sent: Tuesday, January 29, 2002 3:18 PM
To: Jeff Creech; Kim Root
Subject: Andersen Jones short list

Hey, guys. Here's the feedback from Andersen Jones. As I expected, their ideas aren't really any better or more dynamic than what we have put together. My recommendation is for us to narrow down to three potential names, and get some feedback from our consumer study. I can even put together some initial packaging/image ideas here in-house, without spending A/J's time and our money. The main idea here is to get a "feel" for what they will respond to best. This is so subjective - I hate to spend lots of money on this process. Let me know what you guys think.

Oh, by the way - I do want Andersen Jones to help us with branding. And with making sure the name doesn't have anything negative to it. But this just how I feel about where we're at right now. I still want us to have a solid name choice no later than **Feb 15th**.

-Amy

Hi Amy,

We reviewed your short list and made it shorter. We also did some work on the names as well, and those names are listed after the seven in your list. Everything has been trademark searched and tagged accordingly. Of our group, I like TruO2 as one possibility. A story could be crafted around this name basically knocking the competition, and saying that only TruO2 is true medical grade oxygen delivered to the skin, etc.

After you have reviewed these, give me a call to discuss next steps. We have a couple of options.

Best regards,
 Karen

Amy DeWinter

O2 Logic
 O2 Logix
 Oxygenesis
 Allura*
 O2 You
 Oxtreme

TruO2
 Trés O2
 O2 Gellé
 Skin Science*
 Baby Face*
 Vitalé*
 Skinergy*
 Elements*
 Oxygenique
 O2VITA
 Révive*
 Skin Deep*

Jeff Creech

From: Margaret Kivinski
Sent: Monday, February 25, 2002 3:18 PM
To: Jeff Creech; Amy DeWinter
Subject: O2Logics search

Jeff and Amy,

I am ready to send out the search for O2Logics, with the following goods description:

Oxygenated skin care preparations, namely, creams, masks, gels and lotions for the face, hands, feet and

Let me know if you would like a different goods description.

Before I send out the search, please see the following application:

Word Mark	OXY GEN LOGICS
Goods and	IC 003. US 001 004 006 050 051 052. G & S: cosmetics, namely, skin creams, lotions, and skin cleaners
Mark Drawing Code	(1) TYPED DRAWING
Serial Number	76164630
Filing Date	November 14, 2000
Filed ITU	FILED AS ITU
Published for Opposition	January 8, 2002
Owner	(APPLICANT) Colorado Product Concepts, Inc. CORPORATION COLORADO 4880 Havana Street Denver COLORADO 80239
Attorney of	David Wolf
Disclaimer	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "OXY GEN" FROM THE MARK AS SHOWN
Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

This could be a problem since oxygen and O2 are "interchangeable." Let me know what you think.

Margaret

Jeff Creech

From: Amy DeWinter
Sent: Monday, March 04, 2002 7:55 AM
To: Jeff Creech
Subject: Wrap-up

Mornin', Jeff.

I hope you had a great weekend. Just wanted to wrap up from our naming brainstorm on Friday. It looks like we have the following names to discuss with Karen today:

1. Bio2
2. Aeragen (or Aerogen)
3. Erasure
4. Affina

Another idea I had this weekend was the concept of "intuition". What do ya think?

-Amy

P.S. I noticed that I had a remarkably improved vocabulary this weekend from all our wordlists!

3/4/02

TherOx0403

Jeff Creech

From: Jeff Creech
Sent: Monday, March 04, 2002 4:07 PM
To: Margaret Kivinski
Subject: more potential skin cream product names

Hi Margaret,

We are going to try and find another consumer research vehicle to test some potential skin cream product names. As of now, we have another short list of three to consider:

Bio2
Aeragen
Affina

Could you take a look at these candidates from a preliminary standpoint to assess feasibility? I know that you are still waiting on some information on Bio2, but please provide us with your best preliminary assessment of these three names so that Amy can mock up some comps and test them with consumers. Our next approach may be a table at Fascist, er uh, Fashion Island.

We have an internal bias towards Bio2 at this point, so your best guess as to the workability of a stylized mark with a subscripted "2" would be greatly appreciated. We are dying to turn Anderson Jones on with a product name and must do so no later than March 14th due to constraints w/ ACC meeting and personnel availability.

In light of this timeline, if it makes sense to do a more formal search of one or more of these names sooner rather than later, let me know after your preliminary look at them and we can do that.

Thanks

Jeff

Jeff Creech

From: Jeff Creech
Sent: Wednesday, March 06, 2002 10:21 AM
To: Margaret Kivinski
Subject: RE: product name ideas

Margaret,

Thanks for the update. Let me know what the verdict is on the other candidates--if Affina dies on the vine, so be it. I know that there's a great product name out there somewhere trying to break out if we can just grab it.

Jeff

-----Original Message-----

From: Margaret Kivinski
Sent: Wednesday, March 06, 2002 9:58 AM
To: Jeff Creech
Subject: RE: product name ideas

Jeff,

The Aeragen search request went out yesterday with the goods description I proposed earlier, in connection with O2Logics:

Oxygenated skin care preparations, namely, creams, masks, gels and lotions for the face, hands, feet and body.

I will take a closer look at Oxium and Floragen.

I'm still looking at Affina, but it doesn't look great.

Margaret

-----Original Message-----

From: Jeff Creech
Sent: March 06, 2002 9:35 AM
To: Margaret Kivinski
Cc: Amy DeWinter
Subject: product name ideas

Hi Margaret,

I have another product name for your informal examination as a potential skin cream name:

Oxium

Additionally, for consideration as a brand name for the oxygen-carrying PFC, I suggest:

Floragen (or Fluoragen)

FYI: Oxium is the name of a legendary material on Mars although I believe that the word is purely fictitious. I found an obscure nutritional supplement online called either Floragen or Florajen although I could not find any evidence of trademarking.

Please let me know if you were able to put a goods description for Aeragen together; if possible, we would like to place that name in the queue with the US and WISS(?) search immediately. And, if you could give the thumbs up or thumbs down on Affina, that would be great. I don't see any point in doing a formal search on it if you think it's going to flame out.

On a related note, Amy relayed to me a suggestion from Paul that perhaps we could go after older registered product names due to the short life cycle of cosmetics. I wasn't quite sure what to do with this information in light of the fairly current patent office action on a lot of the names that we have eliminated from consideration. If you have any further thoughts on this point, please let me know. I am open to any ideas that will grease the wheels on the name train.

If the muse visits again today, I will send his/her name suggestions to you.

Thanks

Jeff

Jeff Creech

From: Jeff Creech
Sent: Wednesday, March 13, 2002 11:30 AM
To: Margaret Kivinski
Subject: another name to check out

Margaret,

Could you do a cursory check of "Verdani"? That's potential name number 4, which, along with Aeragen, Oxium, and Ingenue, will complete the series for Tuesday's Fieldwork one-on-one interviews.

Thanks

Jeff

Jeff Creech

From: Amy DeWinter
Sent: Wednesday, March 13, 2002 11:36 AM
To: Karen Jones (E-mail); 'FocusJH@aol.com'
Cc: Jeff Creech
Subject: RE: [Fwd: TherOx Questionnaire]
Importance: High

Dear Karen and Jeanne,

Please note that we will actually test 4 names instead of 3 for this name testing round. *This may necessitate a change to the format and structure of the survey* - Jeanne: please advise. There will be 2 images to select from for each name. I'll email them later today. The four names we are looking at right now are:

1. Aeragen
2. Oxium
3. Ingenue
4. Verdani

I will have comp images to you before the end of today. Kristine, our Marketing Assistant, will be putting the comp labels on the canisters for use in the consumer testing. Additionally we would like the interviewer to wear a lab coat, as we did in our in-house consumer testing survey.

Please let me know if you have any questions. I am departing tomorrow for Atlanta, so please contact Jeff Creech at (949) 225-6587 in my absence. I can also be reached on my cell phone at (949) 836-3066 if necessary.

Thanks,
Amy

-----Original Message-----

From: Karen [<mailto:karen@andersenjones.com>]
Sent: Tuesday, March 12, 2002 11:42 AM
To: Amy DeWinter
Subject: [Fwd: TherOx Questionnaire]

Jeff Creech

From: Margaret Kivinski
Sent: Wednesday, March 13, 2002 1:59 PM
To: Jeff Creech
Subject: RE: another name to check out

I think Verdani will be ok. The most likely issues are Versoni (in class 3, to Aroma Cosmetics, Inc.), Verday (in class 3, to Verday Inc.) and Verdia (in class 5, to American Home Products). I think we can deal with each of them.

Would you like me to order a search?

Margaret

-----Original Message-----

From: Jeff Creech
Sent: March 13, 2002 11:30 AM
To: Margaret Kivinski
Subject: another name to check out

Margaret,

Could you do a cursory check of "Verdani"? That's potential name number 4, which, along with Aeragen, Oxium, and Ingenue, will complete the series for Tuesday's Fieldwork one-on-one interviews.

Thanks

Jeff

Jeff Creech

From: Amy DeWinter
Sent: Wednesday, March 13, 2002 2:07 PM
To: Karen Jones (E-mail)
Cc: Jeff Creech
Subject: Multi-lingual checks

Karen,

Can you do me a favor and somehow, someway look into potential landmines with these names in the major European languages: German, French, Italian, Spanish, Portuguese? I just want to make sure that none of these names mean something foul before we move forward. All is looking good so far on the trademark front, Jeff will keep you posted.

Thanks again,
Amy

3/20/02

TherOx0411

Jeff Creech

From: Karen [karen@andersenjones.com]
Sent: Friday, March 22, 2002 3:39 PM
To: Amy DeWinter; Jeff Creech
Subject: The Oxium story

Importance: High

Hi all,

I hope you didn't O.D. on sushi today at lunch in celebration of the finalization of the name!

When you get a chance, could you go to www.oxygenbotanicals.com and review their marketing story to see how this might relate to what we want to or can say about Oxium.

Also, just as a reminder, as Amy and I discussed yesterday after the meeting, we need to reserve the url for Oxium asap. You may also want to consider trying to reserve an 800 number with Oxium as part of the number. You should be able to do this through AT&T without actually activating a phone line at this time.

We will be starting the design process early next week -- any additional input you can give us regarding wording, descriptors, no-no's etc. will be greatly appreciated.

Thanks, and we're really excited to move forward!

Have a great weekend,
Karen

P.S. -- Jeff, I will update you on the possibility of testing the packaging early next week. KJ



*Innovators in
Aqueous Oxygen
Therapy*

Memo

Date: August 4, 2003

To: Kim Root

CC:

From: Jeff Creech, Ph.D.

RE: Oxium website copy

Kim-

Here's my suggested copy for the website sections that we discussed last week. Please feel free to add text or make changes that are appropriate for this audience.

The Science of Oxium

Oxygen is essential for the body to maintain healthy-looking skin. While a certain level of oxygen is maintained at all times in the skin, supplied by the lungs via the vascular system, a large and growing area of medical research has uncovered numerous benefits of elevating the natural supply of oxygen to the skin's tissues. Until recently, the only means to achieve this enhanced level of oxygenation was to receive treatment in a pressurized hyperbaric chamber, a procedure that is costly, time consuming, uncomfortable, and can be performed only at a relatively small number of specialized medical centers.

TherOx, the maker of Oxium, was founded in 1994 on the premise that the benefits of hyperbaric oxygen could be realized in a simpler, more accessible, and convenient way. TherOx has developed medical devices that are designed to deliver highly concentrated oxygen solutions to the body and is conducting a clinical trial to demonstrate the benefits of its AO therapy to treat heart-attack patients. Oxium was conceived and developed as a revolutionary skin care brand that delivers oxygen to the skin's tissues. Through a patented process, oxygen is dissolved into the specially formulated Oxium products, which are packaged in pressurized cans that are designed to keep the oxygen captured in solution until the cream is dispensed for application. Oxium is not available in jars, tubes, or sample packs because of the need to maintain the product in a pressurized can.

When Oxium is applied to the skin, the change in tissue oxygen is dramatic and measurable. Our research laboratory has measured a six-fold increase in skin tissue oxygenation after applying Oxium. We have measured no changes in oxygenation levels after applying nine competitive products that all claim to contain oxygen or enhance oxygenation. Based upon our extensive research efforts, we have not discovered another product that can deliver a measurable amount of oxygen to the skin.

Unlike other commercial products that claim to use oxygen or enhance oxygenation, Oxium does not contain hydrogen peroxide or other harsh chemicals. Oxium's primary ingredient is dissolved oxygen. Our products are free of colorants and fragrance. Our goal is to bring this unique technology to today's savvy skin care professionals and consumers, without relying on the latest marketing fads,

EXHIBIT

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TherOx0379

and allowing the results to speak for themselves: fresher, younger-looking, even-toned, smooth, healthy skin.

Oxium is a cosmetic product intended to beautify and enhance the skin's appearance and is available through selected skin care professionals.

Skin Care Professionals

Oxygen Measurement

Skin tissue oxygenation is measured in the clinical setting using a transcutaneous pO_2 probe. This device is applied to the skin and provides a measure of the oxygenation of the underlying tissue. The term ' pO_2 ' is an abbreviation for 'partial oxygen pressure', and provides physicians and medical care practitioners a standard by which they measure oxygenation of the blood and tissues in the body. TherOx maintains a transcutaneous probe in its R&D research facility located in Irvine, California. Numerous experiments have been performed in the laboratory to optimize the delivery of dissolved oxygen to the skin after applying Oxium. As a progressive company, TherOx has developed an experimental technique that does not rely on animal testing to establish the safe and effective application of its Oxium products on the skin.

The illustration provided in Figure 1 shows the experimental setup, where oxygen transfer is measured across a polymeric skin substitute. The product of interest is placed on one side of the membrane, with the probe attached to the other side. The oxygenation level is measured over time and recorded digitally as a pO_2 reading. pO_2 , or partial oxygen pressure, is 160 mm Hg in air and somewhat less in skin tissues due to oxygen consumption. The graph depicted in Figure 2 shows a dramatic increase in oxygenation that is sustained over a two-hour period. The transfer of oxygen across the polymer membrane is representative of the transfer of oxygen across the skin that takes place after applying Oxium.

A variety of skin care products either claim to deliver or enhance oxygen delivery to the skin. Through laboratory testing using the setup depicted in Figure 1, we are able to show the difference between Oxium and these other products. The bar chart provided in Figure 3 shows the pO_2 measurement taken after 1 hour. The results for Oxium are presented side-by-side with several representative 'oxygen' products. As shown, only Oxium has a level of oxygenation above that of room air, and in fact none of the so-called 'oxygen-based' competitive products achieved any measurable oxygen delivery in our testing.

These results are important to convey to the skin care professional and the consumer. Oxium is the result of years of medically-based research on the optimal method to deliver oxygen to the skin. Protected by several U.S. and international patents, our technology is truly unique in the world of skin care. The oxygenated skin care products that comprise the Oxium brand are the only integrated line that contain and deliver dissolved molecular oxygen for your skin's health.

Wound Healing

A modified version of Oxium is in development for the treatment of minor wounds. Promising initial results have led to an award from the Defense Advanced Research Projects Agency (DARPA) to sponsor these efforts. The benefits of topical oxygen in wound healing are well-documented in the scientific literature, and early work with a topical oxygenated wound cream has demonstrated accelerated collagen synthesis and vascular endothelial growth factor (VEGF) production in a controlled study. These factors are crucial for skin and tissue repair and point towards the future success of these efforts in a broad clinical setting.

About TherOx

TherOx, Inc. was founded in 1994 to develop, manufacture, and market minimally invasive products for the delivery of Aqueous Oxygen (AO) to ischemic tissues. Deeply committed to maintaining the highest standards of scientific excellence, TherOx works with a panel of leading scientific and clinical

advisors who guide the ongoing development of this potentially life-saving technology. The wide range of applications for localized hyperbaric oxygen therapy provides a fertile ground for innovative medical and consumer products to deliver concentrated oxygen solutions.

TherOx is conducting a pivotal FDA-sanctioned Phase II clinical trial to demonstrate the effectiveness of its platform AO therapy to treat heart-attack patients who have undergone urgent angioplasty and stenting. In addition to the initial company focus on cardiovascular disease, TherOx is exploring potential applications for targeted oxygen therapies in cancer, wound healing, skin care, organ preservation, and hemorrhagic shock.

TherOx is located in Irvine, California, one of the world's leading centers for medical technology development. More information is available on the company web site, www.therox.com



*Innovators in
Aqueous Oxygen
Therapy*

Memo

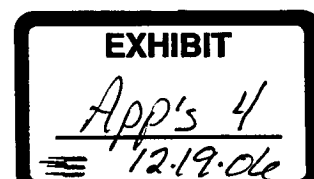
Date: July 9, 2003
To: Skin Care Project Team
CC:
From: Jeff Creech
RE: Oxium Test Market Assessment

Test Market Summary

The Oxium test market, initiated in Q1 2003, has expanded into seven sites, including four high-end spa/salon establishments, two plastic surgery suites, and one dermatological practice. Of these seven sites, four have purchased at least one order of Oxium, one site has declined purchase, and two sites are completing their free product introduction. In summary, five sites have been approached for re-orders and only one has declined, with two pending. One site, the day spa Aromatique in Claremont, has ordered three cases of Oxium to date and has expressed interest in an enhanced product line and additional marketing materials. Results from questionnaire surveys have been very positive, affirming the core belief that consumers perceive benefit in both the idea of an oxygenated skin cream as well as tangible results from using Oxium. More than 40 surveys have been processed, representing approximately 25 % of released materials. In an effort to expand the core customer base, larger cans with a capacity of 4 fl. oz. have been obtained for distribution as a Professional Use Only product. These cans have been tested and adapted into the current manufacturing process; one production batch is ready for sale.

The initial goal of the test market, obtaining market information from non-biased estheticians and paying customers, has been successful and encouraging. At this time, a critical evaluation on the future of the Oxium test market must be completed. Three possible outcomes are:

- Maintain the status quo and continue the test market with the 1.0 oz. Oxium night cream product and 4.0 oz. professional use product
- Expand the test market to include more sites and additional products, including eye cream, day cream, and facial mask application
- Conclude the test market and restrict skin care activities to building leverage for partnering opportunities



TherOx0369

Of these three options, only the last two should be considered. If the test market is to continue, the goals should be profitability, regional establishment of the brand and idea, and growing a seedling business that leaves open the option for a TherOx-operated business independent of potential partnership opportunities. If this option is not under consideration, the test market may not offer substantial benefits moving forward.

Costs and Projections

Operating costs for the Oxium test market have been modest. The COGS for the 1.0 oz. can is \$16.08, including ingredients, packaging, labor, and overhead (\$5.65) costs. This figure also accounts for relatively low yields that are characteristic of small-volume processes (line loss). With a wholesale price of \$45.00 (\$90.00 retail), the gross margin is 64 %. Table 1 lists costs and revenues for the period of February - May 2003 for the Oxium test market:

Table 1. Oxium test market costs.

<u>Description</u>	<u>Cost</u>
Production (600 cans) [‡]	\$9,700
Marketing materials	\$2,200
Sales and Marketing services	\$19,600
Supplies	\$500
Total	\$32,000

Assets and revenues

Inventory (380 cans)	\$6,100
Sales (66 cans)	\$3,000

Net Costs **\$22,900**

[‡]The 154-can difference between production and sales + inventory is accounted for in free introductory samples to test market sites.

The newly introduced 4.0 fl. oz. can for salon use is estimated to have a COGS of \$59.30, including a \$20.58 overhead charge. At a price of \$110.00, the gross margin is 46%. Note: high overhead charges are due to a calculation of 2 x (mfg labor rate). A more thorough and accurate calculation of the actual overhead rate for emulsion production is in process.

To date, no net profit has been realized in the test market. However, having fulfilled its primary purpose of validating the oxygenated emulsion as a viable skin care product, an operating plan to move forward is presented below that will, if successful, meet three primary objectives:

- Explore consumer acceptance of product variations and oxygen-based skin care line based on Oxium brand
- Work towards self-sustaining operations through revenue growth
- Achieve operational break-even point with current TherOx human resources

Meeting these objectives successfully will provide an alternative, or at minimum a complementary option, to current licensing discussions. Because the test market is confined to the physician and spa market, no serious conflict of interest is anticipated with potential mass market license partners.

Operating Plan

Kim Root will spearhead sales and marketing efforts. Aggressive expansion into more market sites, preferably divided into physician-based and spa-based skin care practices, is a pre-requisite for success. These sites may include centers that are outside Southern California but accessible by short flight (Bay Area, Palm Springs, Las Vegas, etc.). Assuming a modest sales volume per site, with some site turnover, a preliminary estimate is that twenty customers can be supported with 4 – 5 products using existing manufacturing facilities. Development of an eye cream, day cream, and possibly a mask application is necessary. The purchasing dynamic in the assisted-sales market typically involves the customers acquiring all their required skin care products during scheduled but infrequent visits to the esthetician. Thus, a varied line of products allows the esthetician to bundle the Oxium line for a complete treatment regimen. A more complete line of products, including a day cream with SPF validation, will establish a stronger basis with which potential licensing options may be pursued.

Products: Sizing, availability, and price points (markup is 100 %)

Type	Fill size (fl. oz.)	Price (Wholesale/Retail)	Est. date available
Night cream	1.0	\$45.00/\$90.00	Feb 2003
Professional Use	4.0	\$110.00/NA	June 2003
Eye Cream	0.5	\$32.50/\$65.00	Oct 2003
Day Cream	1.0	\$45.00/\$90.00	Jan 2004
Mask	1.0	\$30.00/\$60.00	Mar 2004

Sales Projections:

Sales Projections	Aug-03	Sep-03	Oct-03	Nov-03	Dec-03	Jan-04	Feb-04	Mar-04	Apr-04	May-04	Jun-04	Jul-04
Product												
Night Cream	2	5	8	12	16	20	22	25	27	30	32	34
Professional Use	6	8	12	16	20	24	30	35	37	40	40	43
Eye Cream			6	9	12	14	15	17	19	21	23	25
Day Cream						10	16	22	25	28	32	36
Mask								10	14	16	18	20
No. Sites	5	7	10	14	17	20	24	27	30	34	37	40
Revenues (\$) *	1740	3580	7980	11750	15520	24300	29670	39460	44600	49670	54410	59480
Gross Profit (\$) **	1130	2330	5190	7640	10090	15800	19290	25650	28990	32290	35370	38660
*Professional Use product sales are per can. All other product sales are reported per case of 12 units.												
**A 65% composite gross margin is used to calculate profit, pending accurate overhead estimates.												

By mid-2004, manufacturing output is estimated to be at 90% of current capacity. Further market expansion will require at least a modest capital expenditure and additional sales force.

Expenses (\$)	Aug-03	Sep-03	Oct-03	Nov-03	Dec-03	Jan-04	Feb-04	Mar-04	Apr-04	May-04	Jun-04	Jul-04
Mktg/sales consulting	7550	7550	8200	7550	7550	7550	7550	7550	7550	7550	7550	7550
Mktg materials	2000	2000	2000	2000	2000	3000	3000	3000	4000	4000	4000	4000
R&D materials/supplies	3500	2500	2500	2500	1500	1000	1000	1000	1000	1000	1000	1000
External testing*	0	0	20000	0	0	0	0	0	0	0	0	0
Total expenses	13050	12050	32700	12050	11050	11550	11550	11550	12550	12550	12550	12550
Monthly net profit (\$)	-11920	-9720	-27510	-4410	-960	4250	7740	14100	16440	19740	22820	26110
Cumulative net profit (\$)	-11920	-21640	-49150	-53560	-54520	-50270	-42530	-28430	-11990	7750	30570	56680
*One-time expense incurred for SPF testing is accounted for in Oct-03												
Actual net cash out will be somewhat greater with advance purchase of cans and raw materials (Est. \$50K additional)												

Notes on expenses. Consulting services are limited to full-time sales and marketing support from Kim Root and limited support from Sean Root for artwork and website development. Marketing materials include educational sheets and cards for each product, as well as folders and business cards. The large Oct. 2003 product development expense includes estimated costs for day cream SPF testing. An operating profit is anticipated in early Q1 2004, with a break-even point occurring before the end of Q2 2004.

The attempt is made above to operate on a very lean budget. R&D manpower was not included in the above expenses due to partial inclusion in overhead accounting and natural overlap into licensing support activities through further product development. No additional resource is anticipated beyond current in-house capabilities at TherOx to staff the proposed operation.

Intermediate Scale-Up Option

The purchase of a larger mixing/oxygenation vessel will increase production capacity. Cost estimates for a 5 or 10-gallon capacity pressure vessel are in the range of \$30 - \$50K. The expected lead time for this item is 5 - 7 months to be operational. Increased capacity creates an option for additional salespeople and regional expansion, possibly including the Bay Area, Phoenix, or Las Vegas. The financial model changes in the following way when this option is considered: the purchase of capital equipment and advance hire of salespeople will increase the net cash out by ~ \$75K over and above the model above. Operational profits will be realized in Q1 2004, same as above, while a net profit for the venture will be delayed by few months, to late Q2 2004. However, at the end of the 12-month cycle, the payoff for investing in capital is realized and monthly profits are estimated to more than double. Additionally and separate from the test market, the acquisition of a larger batch vessel will enable a smoother transition to large scale commercial scale up of emulsion processing in the future, in either wound or skin care preparation.

Product Improvement

Feedback from test market participants is uniformly positive towards the oxygenated emulsion, but a strong desire has been expressed for a dispenser that is easier to operate. Testing is ongoing in the R&D lab to validate the use of a vendor-supplied lower pressure can. The low-pressure can requires less force to depress the dispensing button, creating a more controlled dollop of cream. We are optimistic that all future products will be ordered with the lower pressure can without compromising available oxygen for the skin. In addition, the use of secondary packaging is highly desirable because the ingredient label may be placed on external packaging rather than on the can itself. This feature enables long-lead time can orders to be placed immediately for the expanded product line without first having a formulation freeze. After each product formulation is fixed, individual boxes may be ordered with the ingredient panel printed on the side. If additional ingredients or modifications are desired, changing a box layout is more cost effective than re-ordering the ABS can.

Recommendations

Based on the above analysis and initial promise with the Oxium test market, proceeding forward with a plan to expand regionally with a full product line offers little strategic or financial risk. Commitment of incremental resource is necessary to fix the formulations of the proposed additional products, and the major lead time for each product will be additional can orders. A decision to increase pilot lab capacity should be made near-term due to inherently long lead times in acquiring equipment. Because further formulation refinement and product development strengthens the potential attraction for prospective licensing partners, continuation and expansion of the test market serves a dual purpose.

OXIUM

The Science of Oxium

How Oxium & Oxygen Work

Oxygen is essential for the body to maintain healthy-looking skin. While a certain level of oxygen is maintained at all times in the skin, supplied by the lungs via the vascular system, a large and growing area of medical research has uncovered numerous benefits of elevating the natural supply of oxygen to the skin's tissues. Until recently, the only means to achieve this enhanced level of oxygenation was to receive treatment in a pressurized hyperbaric chamber, a procedure that is costly, time consuming, uncomfortable, and can be performed only at a relatively small number of specialized medical centers.

TherOx, the maker of Oxium, was founded in 1994 on the premise that the benefits of hyperbaric oxygen could be realized in a simpler, more accessible, and convenient way. TherOx has developed medical devices that are designed to deliver highly concentrated oxygen solutions to the body and is conducting a clinical trial to demonstrate the benefits of its AO therapy to treat heart-attack patients. Oxium was conceived and developed as a revolutionary skin care brand that delivers oxygen to the skin's tissues. Through a patented process, oxygen is dissolved into the specially formulated Oxium products, which are packaged in pressurized cans that are designed to keep the oxygen captured in solution until the cream is dispensed for application. Oxium is not available in jars, tubes, or sample packs because of the need to maintain the product in a pressurized can.

When Oxium is applied to the skin, the change in tissue oxygen is dramatic and measurable. Our research laboratory has measured a six-fold increase in skin tissue oxygenation after applying Oxium. We have measured no changes in oxygenation levels after applying nine competitive products that all claim to contain oxygen or enhance oxygenation. Based upon our extensive research efforts, we have not discovered another product that can deliver a measurable amount of oxygen to the skin.

Unlike other commercial products that claim to use oxygen or enhance oxygenation, Oxium does not contain hydrogen peroxide or other harsh chemicals. Oxium's primary ingredient is dissolved oxygen. Our products are free of colorants and fragrance. Our goal is to bring this unique technology to today's savvy skin care professionals and consumers, without relying on the latest marketing fads, and allowing the results to speak for themselves: fresher, younger-looking, even-toned, smooth, healthy skin.

Oxium is a cosmetic product intended to beautify and enhance the skin's appearance and is available through selected skin care professionals.

EXHIBIT*App's 5*
12-19-06

TherOx0062

OXIUM

Products



Oxium is dedicated to developing highly effective oxygen products. All products in our Oxium Complex line contain oxygen, not hydrogen peroxide, and have no added color or fragrance. Our Advanced Oxygen Renewal Complex is the only treatment product available that delivers concentrated oxygen directly to the skin. Currently our chemists are working on expanding the Oxium line to provide for total skin care. Upcoming products will include a completely unique eye and lip treatment and a daily moisturizer that contains broad-spectrum sunscreen.

Advanced Oxygen Renewal Complex (Now Available)

Oxium Advanced Oxygen Renewal Complex is a patented formulation that contains high levels of dissolved oxygen, hyaluronic acid and Vitamin E as the key ingredients. Oxygen is an essential component in skin cell function and necessary for healthy, youthful looking skin. Nightly use of Oxium Advanced Oxygen Renewal Complex will reduce the appearance of fine lines and wrinkles and improve the look and feel of the skin.

For more information on the benefits and key ingredients of the Advanced Oxygen Renewal Complex, click [here](#).

Total Eye and Lip Complex (Upcoming)

Oxium Total Eye and Lip Complex is a unique blend of powerful anti-aging ingredients that will help to minimize the damaging effects of environmental damage to the skin. In addition to the high levels of oxygen, Oxium Total Eye and Lip Complex contains Green Tea and Grape Seed Extract. Research has demonstrated that both of these ingredients are anti-oxidants that are more powerful than Vitamin C. Grape Seed Extract has been shown to protect collagen breakdown and to aid in collagen stimulation. In addition to its anti-oxidant benefit, Green Tea is also an anti-inflammatory and aids in repairing damage to skin that has been over-exposed to the sun.

Daily Defense Complex (Upcoming)

Oxium Daily Defense Complex is a daily moisturizer that contains broad-spectrum sunscreens that protect against UVA and UVB rays. By combining state of the art sunscreen agents with our unique oxygen delivery system and anti-oxidants, Oxium Daily Defense Complex will provide not only protection from the sun but will help to reduce the visible signs of aging.

TherOx0063

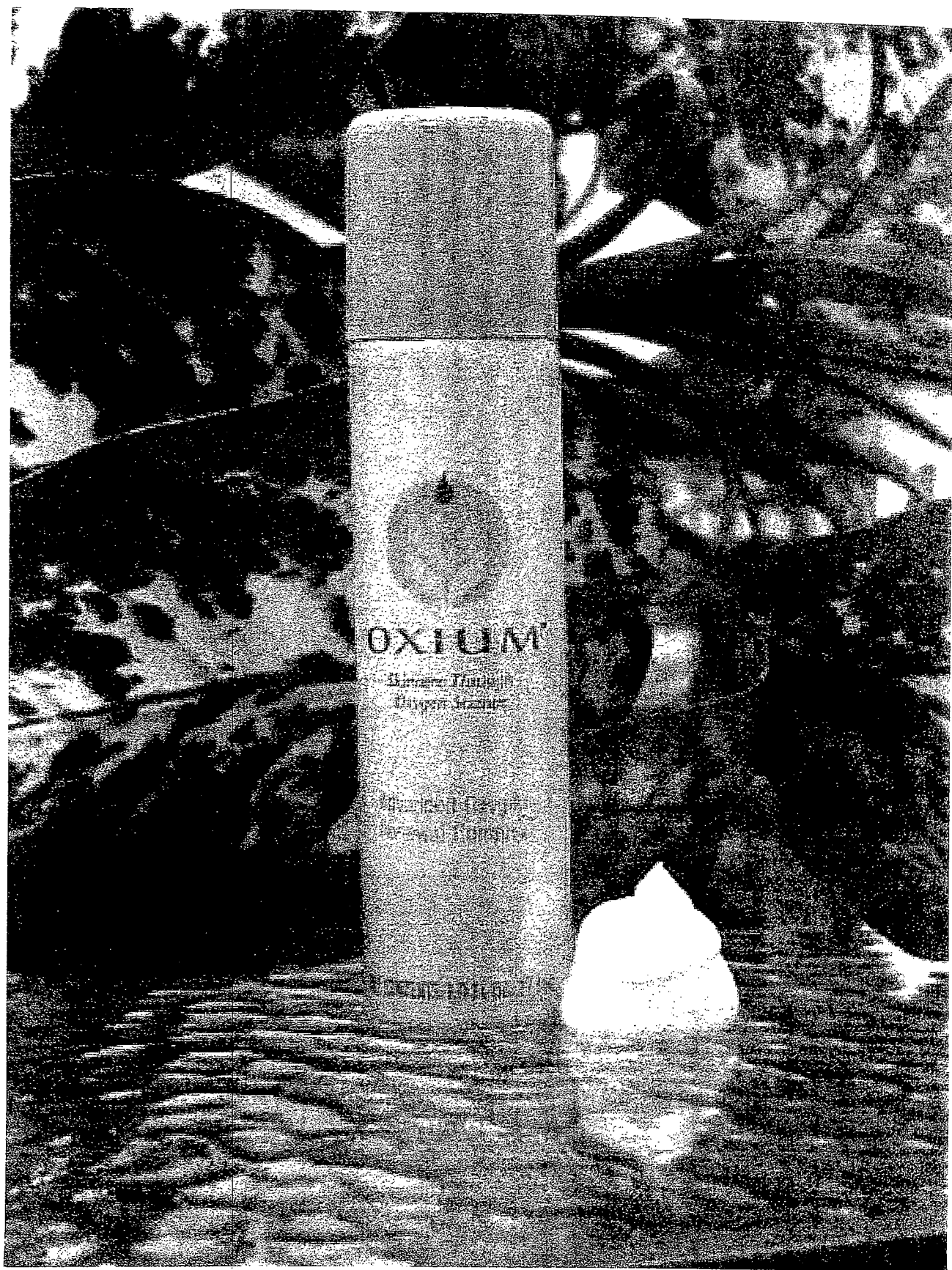


EXHIBIT
App's 6
12.19.06

TherOx0114

DIRECTIONS FOR USE:
Apply and gently rub into skin

INGREDIENTS:
OXYGEN WATER, POLYBUTYLENE GLYCOL,
PROPYLENE GLYCOL, PHOSPHOLIPID,
HYALURONIC ACID, DIMETHICONE,
HYDROXYETHYL ACRYLATE, CETYL ALCOHOL,
STEARYL ALCOHOL, GLYCERYL STEARATE,
POLY-4-VINYLPIRROLIDONE, BENZYL ALCOHOL,
ALBISOL, PARABEN, PROPYL PARABEN

WARNING: CONTENTS UNDER PRESSURE.
DO NOT PUNCTURE OR INCINERATE. DO NOT
STORE AT TEMPERATURE ABOVE 120 °F.
KEEP OUT OF REACH OF CHILDREN.
USE ONLY AS DIRECTED. DO NOT APPLY TO
BROKEN OR IRRITATED SKIN. IF RASH
DEVELOPS, DISCONTINUE USE.

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*Skincare Through
Oxygen Science*

Advanced Oxygen
Renewal Complex

NET CONTENTS 1.0 FL OZ 29.6ml

Internal Memo

Date: March 20, 2003
To: Paul Zalesky
CC: Jeff Creech
From: Kim Root
RE: Skin Care Center Test Market Study

As of March 15, 2003 two of the five centers (Claremont and Santa Monica) have ordered and received one case each of Oxium. Of the remaining three centers I feel that Seal Beach and Beverly Hills will be on board in early April. Esthetician feedback has been extremely positive and the interest level in an O2 product is high (see attached survey). They are definitely looking for the next new thing to add to their services and retail areas. Consumers are giving the product high marks as well and seem to be happy with improvements they are noticing in their skin (see attached survey results). As expected one of the only negative comments we are hearing is in regards to the dispensing button. In follow-up appointments I am educating the estheticians on the best way to dispense product and how to relay this information to their clients. Currently we are looking at adding 2-3 centers to the study in the Southern California area.

EXHIBIT

App's 7
12-19-06

TherOx0340

Oxium™ is the first skin care product to deliver highly concentrated oxygen for rejuvenation and renewal without the addition of hydrogen peroxide or other harsh chemicals. TherOx, Inc., the maker of Oxium™, is excited to bring you this exclusive product and would like your feedback as a skin care professional. Please take the time to answer a few questions and help us shape the future of oxygenated skin care.

1. Oxium™ is the first commercially available skin treatment to contain large amounts of dissolved oxygen. In your professional opinion, how attractive is an oxygenated line of skin care products to consumers?

a. Very attractive	<input type="checkbox"/>
b. Somewhat attractive	<input checked="" type="checkbox"/>
c. Neutral	<input type="checkbox"/>
d. Somewhat unattractive	<input type="checkbox"/>
e. Very unattractive	<input type="checkbox"/>

Most clients are not clear of the benefits of product ingredients until they are explained to them - this includes oxygen, antioxidants, exfoliants such as AHA's, etc.

2. How attractive is an oxygenated line of products to you as a skin care professional?

a. Very attractive	<input checked="" type="checkbox"/>
b. Somewhat attractive	<input type="checkbox"/>
c. Neutral	<input type="checkbox"/>
d. Somewhat unattractive	<input type="checkbox"/>
e. Very unattractive	<input type="checkbox"/>

3. Oxium™ is manufactured by TherOx, a medical research company based in Orange County that specializes in bringing oxygen therapies to the marketplace for a variety of applications, including heart attack treatment and wound healing. How important is this information in your decision to carry Oxium™ in your product line?

a. Very important	<input checked="" type="checkbox"/>
b. Somewhat important	<input type="checkbox"/>
c. Makes no difference	<input type="checkbox"/>

This fact was discussed with all clients I asked to participate in the marketing study. It sparked their interest in the product. It also lends credibility to the product.

4. How much credibility does the fact that Oxium™ is a medically based skin care product lend to its performance?

a. Very much credibility	<input checked="" type="checkbox"/>
b. Some credibility	<input type="checkbox"/>
c. Does not matter	<input type="checkbox"/>

price structure

5. What type of background information on the product is important to you (please check all that apply):

a. Clinical study results	<input checked="" type="checkbox"/>
b. Before and after photos	<input checked="" type="checkbox"/>
c. Client testimonials	<input checked="" type="checkbox"/>
d. Medical endorsement	<input checked="" type="checkbox"/>
e. Oxygen related studies	<input checked="" type="checkbox"/>
f. Other (please specify):	<input type="checkbox"/>

(least important)

6. What other products would you like to see in this line (please check all that apply):

- a. Cleanser
- b. Toner
- c. Day time moisturizer w/SPF
- d. Exfoliator
- e. Lip product
- f. Eye Cream
- g. Travel Size
- h. Hand & Body Line
- i. Professional Line
- j. Other (please specify):

☐
☐
☒
☐
☐
☒
☐
☐
☒

-mask

Acne treatment

7. What other ingredients, if any, do you feel would be beneficial to add to this product (please check all that apply):

- a. Green tea
- b. Vitamin C
- c. AHA's
- d. BHA's
- e. Retinol
- f. Fragrance
- g. Color
- h. Other (please specify):

☐
☐
☐
☐
☐
☐
☐
☐

I like the fact that it is oxygen-specific.

8. In this initial evaluation, Oxium™ has been used as a mask and at home by the consumer as a night cream. Which application do you feel is most suitable for this product formulation:

- a. Mask
- b. Night cream

☐
☒

9. Please explain the preference you chose in question 8, including how you would modify the formulation to change for the application that you did not choose (make it thinner, less greasy, more moisturizing, etc.):

~~it left a film that was difficult to massage in and had to be sponged off. I would add some "slip" to the product and possibly scent with an essential oil to make the masking process more apparent to the client. Otherwise, possibly~~

10. The unique packaging for Oxium™ was chosen so that large amounts of dissolved oxygen can be maintained in the cream. What is your professional opinion of the ease of dispensing product from this container:

- a. Very difficult to control
- b. Somewhat difficult to control
- c. Easier to control with practice
- d. Very easy to control

☐
☒
☒
☐

suspend in a gel/colloidal formulation that will also calm & soothe after extractions, etc. given in a facial that is intended to be washed

11. If you could change one functional aspect of the container, what would it be?

- a. Size
- b. Dispensing button
- c. Controlled amount every time
- d. Ease of use
- e. Other (please specify):

☐
☐
☒
☐
☐

12. Please explain your answer to question 11 so that we can offer a more convenient product in the future: too much product is dispensed. (If unable to change, then I would encourage the client to apply to neck/chest as well)

13. How much do you like the Oxium™ brand name, logo, and graphics?

- a. Like very much
- b. Like somewhat
- c. Neutral
- d. Dislike somewhat
- e. Dislike strongly

① ☒
② ☒
☐
☐
☐
☐

14. Please explain your answer to question 13: ① Oxium name is non-gender specific ② Logo + graphics have a more feminine appeal and remind me of packaging for feminine deodorant products

15. Do you think the Oxium™ name is too similar to any other brand name that you know? If so, please tell us which similar names may cause confusion for the consumer: Not too similar

16. Oxium™ is intended for use as a high-end, exclusive product. Overall, does the product packaging convey this image? Yes ☒ No ☐

Please explain your answer: additional note: in-store support materials such as signs, a display fixture, etc will be important to prevent the product from getting lost amongst other product lines which are more expansive and take more linear display footage

17. How easy was the product to apply and remove during facial treatments?

- a. Very easy
- b. Somewhat easy
- c. Satisfactory
- d. Somewhat difficult
- e. Very difficult

☐
☒
☐
☐
☐
☐

18. How favorably did clients respond after an oxygen facial with Oxium™?
- a. Very favorably ☒
 - b. Somewhat favorably ☐
 - c. Indifferent ☐
 - d. Somewhat unfavorably ☐
 - e. Very unfavorably ☐
- they liked the feel of their skin, were excited to be part of the study.

19. Overall, how strongly do you feel that this is an effective and marketable treatment and product line to offer your clients?
- a. Very strongly ☒
 - b. Somewhat strongly ☐
 - c. Neutral ☐
 - d. Not at all ☐

20. Overall, what do you like or dislike about the product? I love the fact that this product is an add-on sale for me and does not compete with any other products I sell. On a personal note, my own skin texture is smoother, my coloring is more even and reflective, and any breakout I may get seems to clear quickly with the product. I have been spot-treating my own breakout 2-3 times a day with the product and it's quite effective.

Thank you for your time and input. Please provide us with your contact information so that we can respond to your feedback:

Name: Lori Paley

Spa/Office name and location: Aromatique/

Telephone number: 909 626-7422

Claremont

Product and it's quite effective.

Thank you so much for the opportunity to participate in this study. I wish you much success with your product launch!

The Oxium™ Difference

Oxium™ is the only product that delivers high levels of oxygen (not hydrogen peroxide) directly to the skin.



Oxygen, the key ingredient of Oxium,™ is a proven healing agent.



Oxygen aids in the production of collagen, which reduces the appearance of fine lines.

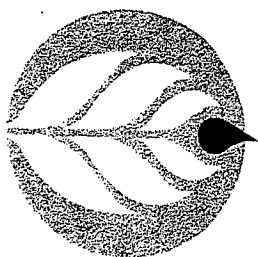


Study participants overwhelmingly felt that Oxium™ improved the appearance of their skin.



Oxium™ contains no harsh chemicals, added colors or fragrance.

OXIUM™



OXIUM™
*Skincare Through
Oxygen Science*

**Advanced Oxygen
Renewal Complex**

Experience the Benefits of a Unique Oxygenated Cream

by TherOx, Inc.
2400 Michelson Drive Irvine, CA 92612
oxium@therox.com
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The Oxium™ Story

Oxium™ is made by TherOx, a medical research company that specializes in developing therapeutic oxygen solutions for a variety of treatments, including heart attack intervention, wound healing and skin care.

Oxium™ is a highly concentrated oxygenated cream that contains 300 times the amount of oxygen in an ordinary glass of water. Oxium™ is a patented emulsion that is uniquely formulated to contain and deliver oxygen to the skin.

Oxium™ contains no hydrogen peroxide or harsh chemicals found in other commercial "oxygen" skin care products.

Laboratory testing performed in our research & development facility on nine competitive "oxygen" products showed that all nine contained less oxygen than the air we breathe.

Try Oxium™ and experience the benefits of a true oxygenated skin cream.

Benefits

Reduces the appearance of fine lines and wrinkles.
Improves skin tone and texture.
Enhances collagen production.



Recommended Use

Apply a small amount to the face and neck nightly after cleansing.

Gently massage into skin.

Follow with a moisturizer if desired.

Use Oxium™ every night to achieve optimal results.



Key Ingredients

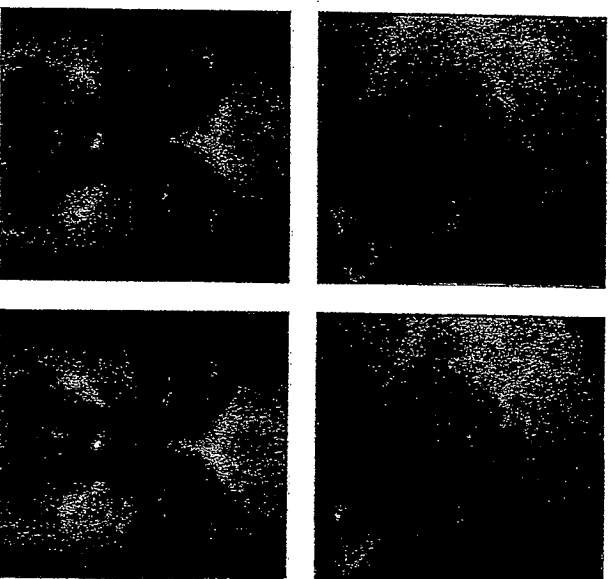
Oxygen
Vitamin E
Hyaluronic acid
No added colorants
No added fragrance

Clearly Visible Results

Study conducted by TherOx, Inc.
Study participants used Oxium™ nightly for six weeks.

BEFORE

AFTER



Study participants reported that Oxium™ improved their skin in the following ways:
cleaner, balanced, more even-toned, healthier, softer and smoother.

100% of study participants felt that Oxium™ improved their skin's appearance.

#I 3 2

NON-CONFIDENTIAL



June 2004



TherOx0174

TherOx, Inc.

PROPOSED TRANSACTION AND CONTACT INFORMATION

TherOx, Inc. ("TherOx" or the "Company") is considering discussions that may lead to the formation of one or more licensing agreements or corporate partnerships with regard to marketing, production, distribution and sales support for its proprietary oxygenated emulsion technology, and/or its *Oxium*TM products.

This Non-Confidential Executive Summary (the "Executive Summary") has been prepared by Burnham Securities, Inc. ("BSI") and TherOx, using information supplied by TherOx's management. The Executive Summary is being furnished by BSI and the Company on a non-confidential basis to the recipients solely for informational purposes and only for use by the recipients in connection with their evaluation of TherOx and the proposed transaction. Its use for any other purpose is not authorized. It may not be reproduced or redistributed, in whole or in part, nor may its contents be disclosed to any other person. BSI and TherOx make no representation or warranty, expressed or implied, as to the accuracy or completeness of such information or any other written or oral communication transmitted or made available to the recipients, and shall not have any liability for any representations (expressed or implied) contained in, or any omission from this Executive Summary or any other written or oral communications transmitted to the recipient in the course of its evaluation of the proposed transaction.

The information contained herein has been prepared to elicit preliminary interest from parties, who will make their independent evaluations of the proposed transaction with TherOx. The Executive Summary does not purport to be all-inclusive or to contain all of the information that a prospective participant may desire. Each recipient of the information and data contained herein needs to perform its own independent investigation and analysis of the proposed transaction and of TherOx. This information and data are not a substitute for the recipient's independent evaluation and analysis.

The Executive Summary includes certain statements, estimates and projections with respect to the anticipated future performance of the Company. Such statements, estimates and projections reflect the Company's various assumptions concerning anticipated results, which assumptions involve significant elements of subjective judgment and analysis that may or may not prove to be correct. No representations are made as to the accuracy of such statements, estimates or projections or with respect to any other materials included herein. Actual results may vary materially from the projected results contained herein. Statements contained in this Executive Summary describing documents and agreements are provided in summary form only and such summaries are qualified in their entirety by reference to such documents and agreements. The recipient agrees to accept this Executive Summary with the express understanding that BSI and TherOx are not subject to liability for its dissemination.

This memorandum does not constitute an offer to sell or solicitation of an offer to buy securities from any person that is not an accredited investor within the meaning of Rule 501 (a) of Regulation D, of the Securities and Exchange Commission.

The securities offered hereby, if any, have not been registered under the Securities Act 1993 ("The Securities Act"), as amended, or any other securities laws, nor has the Securities and Exchange

Commission or any other regulatory authority passed upon the accuracy or adequacy of this Executive Summary or endorsed the merits of the offering. Any representation to the contrary is unlawful. The securities offered hereby, if any, are being offered pursuant to exemptions from the registration requirements of the Securities Act provided by Section 4(2) thereof and Rule 506 of Regulation D promulgated thereunder. The securities may not be transferred by subscribers in the absence of an effective registration statement under the Securities Act, any other applicable securities law or an opinion of counsel acceptable to the Company and its counsel that such registration is not required.

The recipient agrees to promptly return to BSI the Executive Summary and any other information related to the Company it may have received once the recipient has decided that it no longer wishes to participate in the proposed transaction.

ALL INQUIRIES AND COMMUNICATIONS REGARDING THE PROPOSED TRANSACTION OR ANY OTHER MATTERS RELATING TO THEROX WILL BE MADE TO BSI AT THE ADDRESS, TELEPHONE, FAX NUMBERS OR E-MAIL ADDRESSES LISTED BELOW. UNDER NO CIRCUMSTANCE SHOULD THE RECIPIENT OF THIS EXECUTIVE SUMMARY CONTACT ANY PERSON AT THEROX UNLESS SPECIFICALLY REQUESTED BY BSI TO DO SO.

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I. EXECUTIVE SUMMARY

TherOx, Inc. ("TherOx" or the "Company") is the leading innovator in the preparation and targeted delivery of hyperoxygenated solution to ischemic, or oxygen-deprived, tissue. The Company's primary product creates a solution of hyper-elevated concentrations of medical grade oxygen dissolved in sterile saline called *aqueous oxygen* ("AO"), which is mixed with a patient's blood and introduced into the body directly at the affected site. For example, AO is infused into coronary arteries following angioplasty to treat heart attacks and has demonstrated improved heart muscle recovery and healing. Working in parallel with the efforts to establish the intravascular AO therapy, TherOx has adapted the localized hyperbaric oxygen approach into a topical emulsion for wound care, skin care and cosmeceutical markets.

The result has been the development of a **patented aqueous oxygen emulsion**, or AOE, containing a high concentration of dissolved oxygen designed to penetrate intact or compromised skin. The oxygen content of the emulsion is typically **300 times** the amount present in an equal amount of water at room conditions. The product formulation contains no hydrogen peroxide and is optimal in the delivery of hyperbaric levels of molecular oxygen to skin tissue, and has practical applications in both skin and wound care. A series of studies documenting safety and efficacy has been completed that demonstrates the utility and market potential of the technology. TherOx has developed a wound care configuration of the topical emulsion that has proven to dramatically accelerate healing, as observed in a series of pre-clinical studies involving burn and partial thickness wounds. TherOx received a Phase II Small Business Innovation Research "SBIR" grant by the Defense Advanced Research Projects Agency "DARPA" division of the U.S. Department of Defense to develop the AOE for soldier self care on the battlefield.

Cosmeceutical Opportunity for *Oxium*TM

TherOx has also developed a range of skin care products, including a night cream, an eye and lip cream, and a day cream, and a limited test market of the first two is being conducted in Southern California under the brand name *Oxium*TM. Researchers have known for years that oxygen therapy can be beneficial to the skin. Recently, a number of consumer product companies such as Avon, Peter Thomas Roth and Karin Herzog have touted the benefits of oxygen therapy through new skin moisturizer product introductions, with positive consumer feedback and strong sales. Recognizing this increased demand for oxygen therapy skin rejuvenation products, the Company developed *Oxium*TM, a skin cream containing even higher concentrated levels of oxygen than are present in the Company's *aqueous oxygen* solution. *Oxium*TM provides a "skin defense system" that supplies and boosts the energy required to repair skin naturally. *Aqueous oxygen* emulsion therapy provides increased tissue oxygen, which has been demonstrated in the literature to:

- provide critical energy for cellular function;
- boost metabolism, repair capabilities, and collagen production;
- increase micro-capillary circulation and stimulate local production of VEGF, a crucial precursor to new capillary formation; and
- increase skin fiber tensile strength.

Although competitive products appear at first glance to contain elevated levels of oxygen that will help skin look and feel younger, none contains levels of oxygen that are greater than that found in the air we breathe. As illustrated in Figure 2, page 4, **Oxium™** is the only skin care product that can legitimately claim to contain elevated levels of oxygen. The skin care market, which includes "cosmeceutical" products marketed to produce youthful skin regeneration, is enormous - with 2002 sales of \$6.4 billion in the United States alone.¹ Retail sales of skin care products have grown 6.5% annually over the five years ending 2002. A portion of this growth is driven by more baby boomers, both female and male, wanting to stay young looking, as well as by societal acceptance that age can be defied through cosmetics. As a result, the market is expected to exceed \$6.6 billion by 2007.²

The Company has conducted limited clinical trials to confirm the safety and consumer appeal of **Oxium™**. Safety results show that **Oxium™** compares favorably to other skin care products and does not require reformulation. In addition, self-assessment questionnaires have demonstrated an overwhelmingly positive response from study participants. The unique opportunity represented by **Oxium™** can be summarized by the following:

- high oxygenation levels are known to **regenerate skin** tissue and **boost underlying collagen** production and cell metabolism;
- so-called competitive "oxygen" skin care products do not contain high levels of oxygen, as demonstrated in laboratory testing by the Company; and
- the Company has seven issued patents and additional patent filings covering all key aspects of the *aqueous oxygen emulsion* technology to ensure exclusivity of this opportunity in a highly competitive market.

The potential applications of **Oxium™** are numerous and constitute a complete line of skin care products. The Company has consumer ready formulations for two products - a concentrated "night repair" product to improve skin texture and decrease fine lines and wrinkles, and an eye and lip cream to moisturize and nourish the delicate skin around the eyes and lips. The Company is refining formulations for three additional products - a lightweight daily facial moisturizer with SPF 15, a rejuvenating treatment mask, and a hand and body moisturizer to restore hydration to the skin.

Large and Sustainable Market

The overall US market for cosmetics (male and female), including cosmeceuticals, in 2002 was robust and witnessed the introduction of many new products. TherOx expects that its oxygenated skin cream will be used in several key market segments including anti-aging, facial and body moisturizers, facial cleansers, and sun care. The company believes these market segments offer the greatest initial opportunities, as well as significant revenue generating opportunities. These segments had total sales of over \$7.6 billion in 2002.³ In addition, the company perceives the men's skin care market as a unique growth opportunity. As reported recently in the Wall Street Journal⁴:

¹ *The Market for Cosmetics and Toiletries in the US*, Euromonitor Plc., May 2003, pp. 4, 332.

² *Id.* at pp. 5, 366.

³ *Id.* at p. 332.

⁴ Christina Passariello, *Sales to Men Lifts Beauty Market*, Wall Street Journal, April 7, 2004, p. B2E.

“Men are increasingly interested in their looks.”

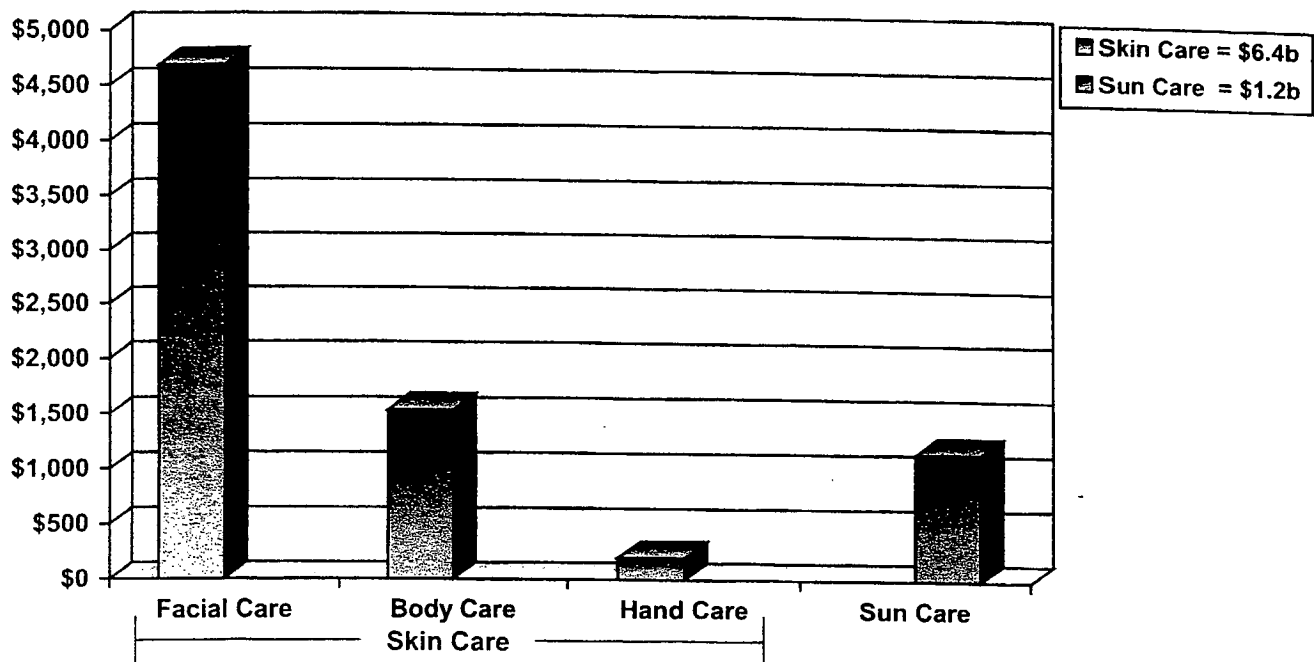
“Though it still represents less than 4% of the \$16 billion men’s grooming market, and only a drop in the \$202 billion global cosmetics market, the \$571 million beauty-products sector takes the prize for the most robust growth in 2003, at 21%.”

“Skin care for men is really starting to follow in the footsteps of the women’s market.”

“Euromonitor forecasts a 67% increase by 2008, bringing the sector just short of the \$1 billion mark.”

In addition, medicated skin creams, particularly the anti-acne OTC market represents a realizable opportunity based upon initial results from a pilot acne trial with the TherOx emulsion. Critically important to these market segments will be the Sustainable Competitive Advantage that the AOE technology will give to the chosen market participants.

Figure 1: US market 2002 sales for selected skin and sun product categories (\$ in millions).



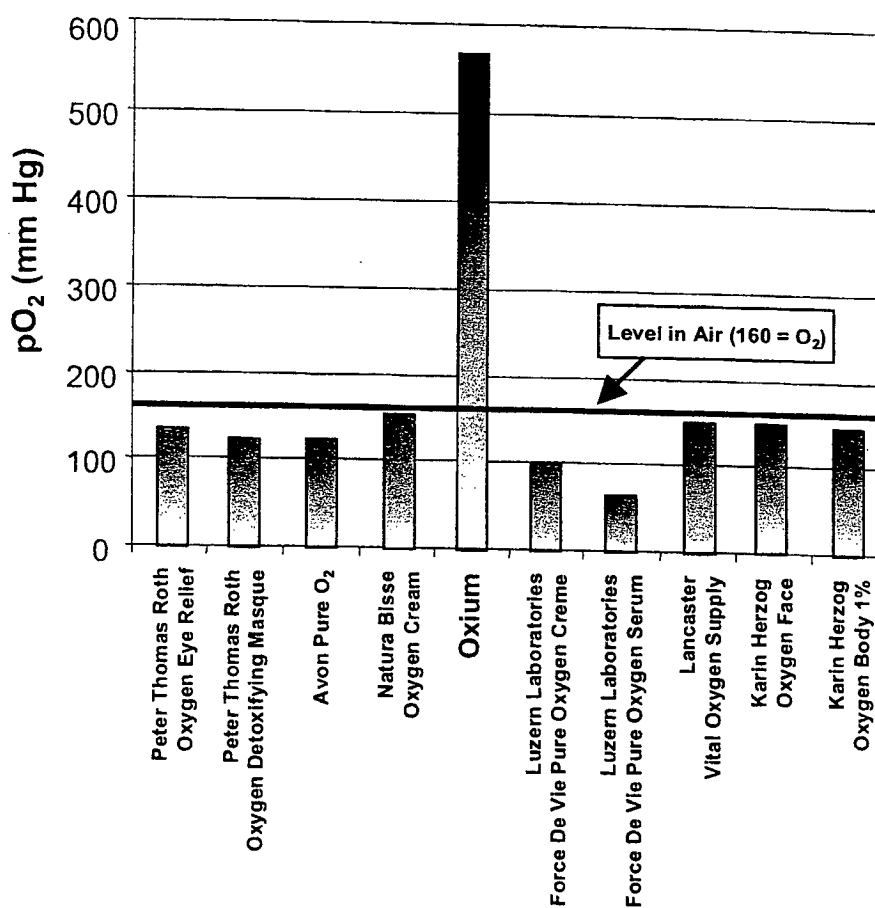
The total US skin care market, including facial, body, and hand care, reached \$6.4 billion in retail sales in 2002. TherOx believes that there is a unique opportunity to give selected partners a **Sustainable Competitive Advantage** in the various market segments for Hand and Body Lotion, Moisturizers, Anti-aging Treatments, and Sun Care products. *Source: The Market for Cosmetics and Toiletries in the US, Euromonitor Plc., May 2003, pp. 4, 332, 384.*

Oxygen Therapy with No Direct Competition

A number of commercially available skin care products are offered that either claim to contain or deliver enhanced levels of oxygen to the skin. The marketing appeal of an oxygenated skin care line is

apparent by the commercial success of the Karin Herzog, Peter Thomas Roth, Avon Pure O₂, and other "oxygen"-based cosmetic products. Despite the obvious appeal and market recognition of oxygen as a cosmetic or cosmeceutical ingredient, no existing commercial products deliver oxygen to the skin. After extensive testing of the aforementioned brands and other purported oxygenated skin care offerings, the TherOx R&D laboratory has confirmed that the TherOx AOE is the only formulation that contains and delivers elevated levels of oxygen. In fact, the oxygen content of the other tested products is less than the level present in the air we breathe. These results are presented below in Figure 2. Although there are other products using "active" ingredients such as alpha hydroxy acids (AHA), retinol, copper peptides, amino-peptides, byproducts of the Sake fermentation process, etc., there is no product utilizing a similar and promising technology.

Figure 2: Restoring the skin. Actual comparison of the "oxygen" content in brand-name high-end products currently on the market. The TherOx oxygenated emulsion is shown in red.



In vitro testing shows that several skin care "oxygen" products actually contain less oxygen than the air we breathe. In contrast, the **Oxium™** product marketed by TherOx contains and delivers a remarkably high level of oxygen to the skin. *Source: TherOx.*

TherOx currently has 49 issued patents and 21 patents pending that it either owns or exclusively licenses. These patents provide broad protection for the intravascular AO therapy, covering the preparation and delivery of hyperoxygenated liquid, as well as the oxygenated emulsion formulation

and application. TherOx has never had reason to enforce its patents, nor been alleged to be in violation of patents held by others. TherOx has seven issued patents and additional pending patents covering the emulsion vehicle formulation, specific broad applications of the topical treatment, and the dispensing/delivery system.

TherOx has an exceptionally strong base of investors, including Citigroup, Enterprise Development Fund, Hambrecht & Quist Capital Management, and Kleiner Perkins Caufield & Byers. In addition, the senior management team at TherOx has over 100 years of combined experience in the medical device industry.

TherOx is located in Irvine, California and has 28 employees. TherOx leases an 18,000 square foot facility that houses its corporate offices, manufacturing facilities, clean room, and research and development space.

Proposed Transaction

TherOx seeks relationships with leading strategic partners in the areas of skin care, cosmetics and cosmeceuticals, as well as wound care and dermatology. The Company seeks different agreements based on the multiple product applications of its patented aqueous oxygen emulsion technology.

Specifically:

- **Skin Care, Cosmetics and Cosmeceuticals**

TherOx seeks a long term licensing agreement with a strategic partner who will commit to an aggressive program for the use of AOE in its skin care product lines. TherOx seeks an upfront payment and stream of royalties.

- **Wound Care**

The Company perceives the opportunity to employ its AOE technology in two specific areas: OTC products and advanced wound care products.

- *OTC Wound Care Products*

The Company believes its AOE technology can be used, as tested, for consumer non-prescription wound care OTC products. Consequently, the Company is seeking a long term licensing and marketing agreement framed by an upfront payment and royalties.

- *Advanced Wound Care Products*

The Company understands that there are significant regulatory milestones, clinical trials and reimbursement reviews to be met. Consequently, the Company seeks a strategic relationship with a leading wound care company who is committed to maintaining its leadership. TherOx expects its partner to fund the necessary clinical trials, develop the necessary packaging, and obtain regulatory approvals. The Company is seeking specific milestone payments based on agreed endpoints and a defined percentage of royalties.

- **Acne Treatment**

Two separate opportunities: OTC and Rx.

- *OTC Acne Products*

The Company believes its AOE technology can be used, as tested, for consumer focused anti-acne OTC products. Consequently, the Company is seeking a long term licensing and marketing agreement framed by an upfront payment and royalties.

- *Rx Acne Treatment*

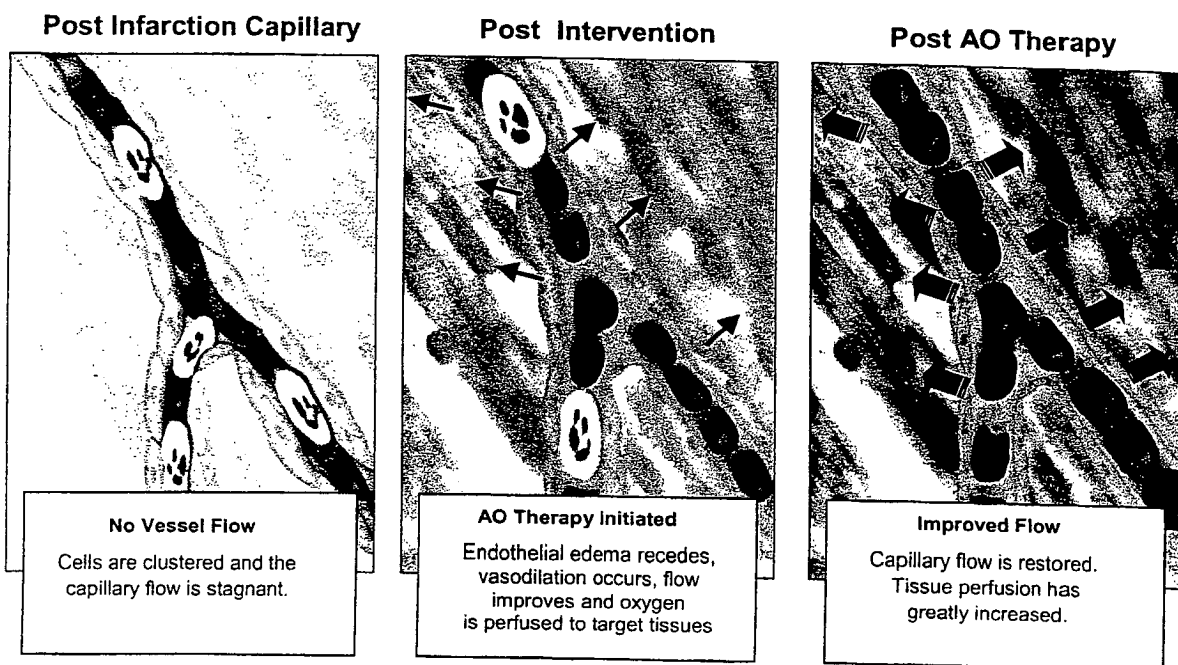
The Company is seeking a relationship with a leading pharmaceutical company, which has a strategic interest in the field of dermatology with a product pipeline and strong marketing presence. Realizing it has only conducted a pilot study on the effectiveness of the AOE in acne treatments, the Company seeks an appropriate partner who would be responsible for conducting the complete clinical trial process. The Company will seek milestone payments based on well-defined endpoints and royalties based on a percentage of gross revenues.

II. KEY CONSIDERATIONS

Origin of the Unique Aqueous Oxygen Patented Technology

Working in parallel with the efforts to establish the intravascular AO therapy, TherOx has adapted the localized hyperbaric oxygen approach into a topical emulsion for wound care, skin care and cosmeceutical markets. The Company's unique technology creates a solution of hyper-elevated concentrations of medical grade oxygen dissolved in sterile saline called *aqueous oxygen*, which is mixed with a patient's blood and introduced into the body directly at the affected site. By providing ischemic tissue with hyperoxemic blood⁵, the stunned or damaged tissue is resuscitated, thus dramatically improving patient outcomes. The effectiveness of the Company's AO therapy has been demonstrated in multiple clinical trials and the Company believes that its therapy will become an industry standard. The Company's initial target market, for this AO technology, is patients who have experienced an acute myocardial infarction ("AMI"), or heart attack; the Company believes this represents an addressable market of over 500,000 patients - or \$1 billion annually - in the U.S. alone. TherOx's AO therapy has the ability to resuscitate stunned cells, and thus shrink infarction size. The treatment is tantamount to direct angioplasty of the capillaries. By perfusing the infarcted area with blood that has **high levels of dissolved oxygen**, AO corrects capillary edema, reverses vasoconstriction, and enables highly oxygen rich blood to reverse myocardial ischemia (as seen in Figure 3). Unlike existing therapies, which only address perfusion of occluded arteries, AO therapy focuses on the microvasculature to resuscitate entire regions of the myocardium by **improving capillary circulation**.

Figure 3: Restoring microvasculature perfusion. The Company's clinical studies to date have clearly demonstrated the significant incremental benefit of utilizing AO therapy following current AMI treatment.



⁵ Hyperoxemic blood is blood that has high levels of oxygen created by dissolving oxygen into saline at hyperbaric, or greater than normal, pressure and mixing the oxygen-enriched saline with blood.

Benefits of Hyperbaric Oxygen Treatment for Skin Tissue

A constant and adequate oxygen supply is important for cell and tissue homeostasis. Oxygen plays a key role in energy production, cell membrane maintenance, mitochondrial function, and cellular repair. Physical injury to skin, such as burns, compromises the arterial, venous, or capillary systems of tissue, which in turn may secondarily cause hypoxia and ischemia. The necessary tissue repair requires an increased metabolic activity of both the affected cells and inflammatory cells, resulting in a milieu with a high oxygen demand albeit the low oxygen supply. This scenario can impair tissue repair and shows that oxygen is required for various aspects of wound healing. Recent research has demonstrated that increased oxygen tension in a wound promotes wound healing by stimulating several processes including phagocytosis (engulfing of microorganisms, cells or debris by macrophages or neutrophils), degradation of necrotic wound tissue, collagen production, neovascularization, and neutrophil-mediated oxidative microbial killing. Based upon this clinical framework, studies have shown that hyperbaric oxygen can be used to heal ischemic tissue. Prior to the development of TherOx's unique technology, hyperbaric treatment was administered by using large and cumbersome pressurized chambers, which are neither cost-effective nor widely available. TherOx developed the topically applied AOE to meet a market need for a practical and relatively inexpensive hyperbaric oxygen therapy for wound healing.

The health of the epidermis and outer dermis of the skin is critically dependent on the oxygen supplied to those tissues. The discovery that the outer layers of the skin absorb oxygen from the ambient environment rather than from the vascular system dates to the nineteenth century. Recently published data⁶ report that the penetration depth for atmospherically supplied oxygen is as great as 400 microns, or nearly half a millimeter in thickness. The challenge in providing a readily available source of oxygen for the skin represents a remarkable opportunity in traditional cosmetic as well as cosmeceutical markets, and some industry players have capitalized on the intuitive appeal of an "oxygen" story in several product lines.

Hyperbaric treatment is now available in a skin cream, and, in pre-clinical studies, has been shown to stimulate production of collagen and growth factors that are critical for overall skin health and appearance. Oxygen transfer from the cream into the skin occurs via two important mechanisms: diffusion and convection. Diffusion describes the molecular migration of oxygen from the cream into the skin, and is proportional to the large oxygen concentration gradient between the applied emulsion and skin tissues. Duration of effect over hours or even days was observed *in vitro*, due to the characteristically slow diffusion process. A second important oxygen transfer process occurs via convection, wherein the cream is absorbed directly into the skin and transports the solubilized oxygen directly to the tissues. Rapid absorption of the cream, which occurs on a time scale much faster than diffusion, ensures efficient delivery of the cream's oxygen load to the application area.

The combination of diffusive and convective transfer maximizes the effective dose of hyperbaric oxygen to the skin while minimizing the amount of oxygen lost to the ambient surroundings during dispensation and delivery. A significant enhancement of tissue oxygenation is observed upon application of the emulsion.

⁶ M. Stucker *et al.* (2002). *J. Physiol.* 538:985 – 994.

Demonstrated Efficacy in Controlled Studies

TherOx has investigated the potential for the oxygenated topical emulsion as a wound-healing agent in pre-clinical studies conducted jointly with the University of Miami Department of Dermatology and Cutaneous Surgery. These studies were funded by the U.S. Dept. of Defense through DARPA under the SBIR program, as part of an overall program to develop more effective means of soldier self care on the battlefield. Two well-established animal models, examining second-degree burns and partial thickness wounds, were chosen for evaluation, using the posterior back region of young swine. Results show that wounds treated with the oxygenated emulsion heal dramatically faster than non-treated control wounds, and that the oxygenated emulsion outperforms the current standard of care.

Positive Consumer Feedback and Limited Market Introduction

Focus Groups and Consumer Research

TherOx began to explore the feasibility of cosmeceutical application of the oxygenated emulsion in Q4 2001. Two focus groups of 10 – 15 women each, in two separate age groups (30 – 45 and 45 – 60 years of age, respectively), were conducted by an independent moderator from Focus Research, Inc. The three areas of interest included the general perception of oxygen and oxygenated skin care products, spot-on evaluation of the TherOx oxygenated emulsion, and consumer perception of the tie-in between medical efficacy in wound care and effectiveness of skin care products. Before the introduction of the TherOx product, both groups were skeptical of oxygen-based skin care, partly influenced by existing product lines that sold “oxygen” based products in name only. After allowing the participants to try the product, the resulting enthusiasm generated enough interest to pursue the project further at TherOx. Some excerpted comments from the focus group sessions are provided below:

“When I first put it on, I rubbed it in. I could tell a visible difference between my dried-out hand (and the hand to which the product was applied.) It had a really nice matte, a moist look.” (Age 30-44)

“(The hand with the product) looks a lot more moisturized, a lot healthier. It doesn’t look as dried out as my other hand, and it feels softer.” (Age 30-44)

“My skin is whiter.” / “Velvety.” / “Yes, velvety and very smooth and less wrinkles.” (Age 30-44)

“I can see a difference in my hand already. It’s smoother, with less lines.” / “I see a huge difference on my hand! Less wrinkles. Look at this!” (Age 45-60)

At the time these focus groups were conducted, only a preliminary formulation effort had been conducted at TherOx. The encouraging response was coupled with a general perception from focus group participants that the medical benefits of an oxygenated cream would correlate with skin care benefits, and lend credibility to the product. TherOx made the decision to commit resources to refining the formulation and packaging for the skin care market while maintaining a large deliverable oxygen concentration.

TherOx followed up this focus group study with a refined product formulation and conducted a pair of consumer trials in 2002 with the emulsion. Participants were asked to use the product daily as a night cream and take weekly photos, in addition to receiving an oxygen facial treatment with each follow-up visit. TherOx conducted these trials, which lasted six and twelve weeks, respectively, with the help of a licensed esthetician with experience in both client services and sales in the professional skin care market.

Feedback was obtained for both the 6 and 12-week trials in the form of surveys, completed at the midway and endpoints of the studies. Questions probed for specific formulation feedback, as well as the perceived product effects on the skin. Survey results from the first six-week trial revealed that consumers were complimentary of the product's look and feel, its effects on the skin, and 14/15 participants answered "Yes" to the following two exit survey questions:

- 1) Do you feel that the product is improving the look of your skin over time?
- 2) Would you continue to use the product?

Results from the twelve-week consumer trial were equally impressive in terms of positive self-assessments from participants. This market research data is available from TherOx upon execution of a NDA.

Test Market

Following favorable consumer feedback, a limited test market was initiated in Q1 2003 in the local Southern California professional segment. TherOx has marketed and sold the AOE under the brand name "**Oxium™**" to selected estheticians operating in upscale spas and/or dermatology and plastic surgery suites. The suggested retail price of the 1.0 fluid ounce package of **Oxium™** Advanced Oxygen Renewal Complex is \$90.00. The successful outcome of the limited test market was that it generated positive consumer feedback, supported the suggested price point, and resulted in repeat purchases. TherOx is enhancing this market research effort with formulation variations to broaden the base of demonstratively successful oxygenated skin care offerings. This endeavor has provided **confidence that the oxygenated emulsion can be marketed and sold in the high-end professional segment at a premium price.** Esthetician clients who sell **Oxium™** to their customers can be contacted upon execution of a NDA.

An unsolicited email from an **Oxium™** user follows:

"The package is very nice, clean, simple/neat, compact which I like very much. Again it doesn't look 'fu-fu.' The product is excellent. It dispenses very fast out of the container, which I realize is necessary because of the oxygen. I don't have bad skin, I'm 39 years old. I love how it smoothes out my skin, softens, plumps my skin, my makeup goes on smoother, in fact I barely even have to use any make-up at all. I notice less and less fine lines and although I've used it for greater than 6 weeks, I feel like I'm still seeing improvements. It is a great moisturizer. People stop me and compliment me on my skin, which never has happened before. Honestly, it is a great product. I'm excited for your company, because I think you are going to hit a homerun with it. I've told all my friends who are dying to try it!!!"

Oxygen Therapy with No Direct Competition

As stated in the Executive Summary, a number of commercially available skin care products are offered that either claim to contain or deliver enhanced levels of oxygen to the skin. In an effort to determine the validity of their marketing position, TherOx conducted oxygen transfer measurements on a number of these competitive products, comparing the results to the TherOx emulsion. Figure 2, page 4, depicts the results, which show that the products tested to date actually contain a lower level of oxygen than room air.

The *in vitro* results underscore the uniqueness of the TherOx technology as well as the untapped market demand for an efficacy-based oxygenated skin cream.

Large and Sustainable Addressable Market

"As more Americans in the baby boomer generation turn 50, the more they want to defy the aging process. This desire to turn back or prevent the ravages of time gave the cosmetics and toiletries industry strong impetus to develop age-defying products. Most of these products fall under the rubric of cosmeceuticals, products containing active ingredients that claim to provide clinical effect in addition to their traditional cosmetic function. The growing interest in cosmeceuticals is symptomatic of a general rise in the preoccupation with 'wellness' and youthful appearance."⁷

The *Oxium*TM technology is unique. It addresses a significant and growing consumer need. Most importantly it will enable specific companies within targeted market segments to achieve a Sustainable Competitive Advantage ("SCA"). The ability to achieve a level of SCA is strategically important in markets where new unique product innovation is rare. The markets which TherOx's technology addresses are large as shown in tables A and B - encompassing a total of over \$7.6 billion in 2002.⁸

The Company expects the focus of its technology will be on the facial care sector, which includes anti-aging products, moisturizers, cleansers, toners and masks, as well as the hand care and body care sectors which offer the greatest initial opportunities because of their higher growth rates and margins. In addition, the medicated skin creams, specifically the anti-acne OTC market, represents a realizable opportunity based upon promising initial results from a pilot acne trial with the TherOx emulsion. The Company believes at first its technology will be marketed towards the premium priced segment of the skin, including facial care markets. In addition the company perceives the men's skin care market as an unique growth opportunity. As reported recently in the Wall Street Journal⁴:

"Men are increasingly interested in their looks."

"Though it still represents less than 4% of the \$16 billion men's grooming market, and only a drop in the \$202 billion global cosmetics market, the \$571 million beauty-products sector takes the prize for the most robust growth in 2003, at 21%."

"Skin care for men is really starting to follow in the footsteps of the women's market."

"Euromonitor forecasts a 67% increase by 2008 bringing the sector just short of the \$1 billion mark."

⁷ *The Market for Cosmetics and Toiletries in the US*, p. 5.

⁸ *Id.* at pp. 57, 366, 398, 399.

Table A – Forecast US Retail Sales of Skin Care by Subsector: Value 2002-2007 (US \$ million).

	2002	2003	2004	2005	2006	2007
Skin Care	6,428.9	6,487.0	6,534.2	6,574.8	6,611.8	6,630.3
Facial care	4,689.4	4,732.0	4,760.8	4,787.8	4,814.1	4,824.0
- Facial moisturizers	1,537.6	1,514.5	1,493.3	1,473.9	1,454.7	1,430.0
- Nourishers/anti-agers	1,405.0	1,490.7	1,566.7	1,638.8	1,709.3	1,775.9
- Facial cleansers	1,309.2	1,300.4	1,284.7	1,268.2	1,251.6	1,227.6
- Toners	376.8	364.4	353.1	343.2	334.3	325.9
- Face masks	60.9	62.0	63.0	63.7	64.2	64.6
Body care	1,536.2	1,550.0	1,567.1	1,579.6	1,589.1	1,597.0
Hand care	203.3	204.9	206.4	207.4	208.6	209.3
Sun Care	1,159.8	1,182.2	1,204.7	1,227.8	1,251.4	1,268.7

Table B – Forecast US Retail Sales of Skin Care by Subsector: % Value Growth 2002-2007 (% constant value growth).

	2002-07 CAGR	2002/07 TOTAL
Skin Care	0.6	3.1
Facial care	0.6	2.9
- Facial moisturizers	-1.4	-7.0
- Nourishers/anti-agers	4.8	26.4
- Facial cleansers	-1.3	-6.2
- Toners	-2.9	-13.5
- Face masks	1.2	6.0
Body care	0.8	4.0
Hand care	0.6	2.9
Sun Care	1.8	9.4

Source: *The Market for Cosmetics and Toiletries in the US*, Euromonitor Plc., May 2003, pp. 57, 366, 398, 399.

Strong Patent Portfolio

TherOx has broad patent protection covering virtually every aspect of AO therapy, totaling 49 issued and 21 pending patents that are owned outright or exclusively licensed. TherOx has seven issued patents and additional pending patents covering the emulsion vehicle formulation, specific broad applications of the topical treatment, and the dispensing/delivery system. With respect to the AOE Program, TherOx enjoys broad patent protection for emulsions and methods of making and using emulsions in which one liquid phase of the emulsion is supersaturated with a gas, most notably oxygen. The extent of coverage can be interpreted easily using the aforementioned Figure 2, page 4, showing the oxygen levels of the TherOx AOE versus competitive products. Any product that crosses the line representing the oxygen content of ambient air would be supersaturated and thus in violation of TherOx intellectual property.

Multiple Applications

The innovative TherOx AOE could be a platform technology with a variety of applications in both wound and skin care. Excellent pre-clinical data points to a range of uses in treating superficial wounds, including but not limited to burns, partial thickness wounds, and chronic lesions. Applications in plastic surgery are numerous, especially post-procedure treatment. For skin care, the Company has consumer ready formulations for two products – a concentrated “night repair” product to improve skin texture and decrease fine lines and wrinkles, and an eye and lip cream to moisturize and nourish the delicate skin around the eyes and lips. The Company is refining formulations for three additional products – a lightweight daily facial moisturizer with SPF 15, a rejuvenating treatment mask, and a hand and body moisturizer to restore hydration to the skin. The cosmeceutical applications of the AOE are only limited by resources and marketing potential, and many other product offerings are possible. The Company believes its technology will give its future partners a **Sustainable Competitive Advantage** based on its technological uniqueness and strong patent protection.

III. TECHNOLOGY AND BUSINESS OVERVIEW

Company History

For the past 20 years, J. Richard Spears, M.D. of Wayne State University in Detroit, Michigan has focused his research efforts on the delivery of high concentrations of oxygen to hypoxic or oxygen-deprived tissue. Dr. Spears, along with a growing number of researchers, believes that the targeted delivery of high concentrations of oxygen to an affected site can renew oxygen-deprived tissue. In the early 1990s Dr. Spears developed a novel technology, now referred to as ‘aqueous oxygen’, that allows for the delivery of pressurized, oxygenated saline to the blood without forming gaseous emboli. In June 1994, together with Paul J. Zalesky, Ph.D., Dr. Spears co-founded TherOx to commercialize this technology.

After ten years of sustained development, these efforts have produced an intravascular treatment termed ‘AO therapy’ that is tailored to the interventional cardiology market for heart attack patients. AO therapy, which is performed immediately following angioplasty and stent placement, provides hyperoxemic blood that is oxygenated to approximately ten times its normal concentration and pumped via catheter into the patient’s affected coronary artery. The 90-minute procedure, which utilizes an automated extracorporeal circuit with hardware, software, and disposable medical devices, is finishing evaluation in a 270-patient pivotal FDA-sponsored U.S. clinical trial. FDA approval of this therapy is anticipated in Q1 2005.

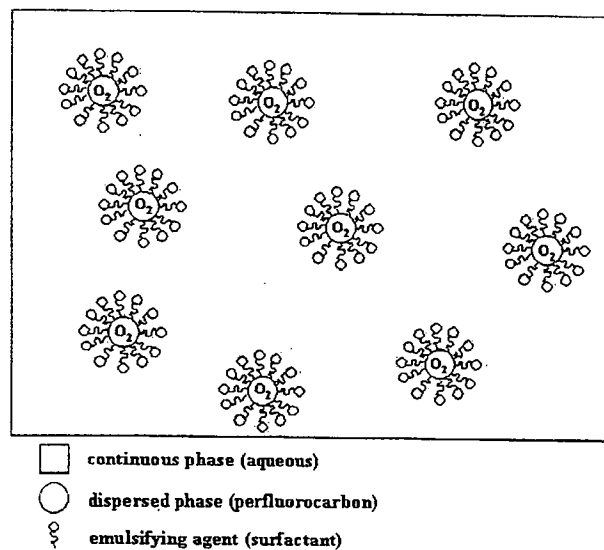
In collaboration with Dr. Spears, as well as opinion-leading dermatologists and skin care business executives, TherOx has developed the oxygenated emulsion as a topical hyperbaric oxygen treatment. The common denominator for all of TherOx’s innovative applications is the local delivery of high, sustained oxygen levels without the need for a hyperbaric chamber. While the company’s core business and marketing efforts are focused on the cardiovascular applications of its intravascular AO therapy, an aggressive plan is pursued to develop and find strategic partners for other therapeutic applications of its unique technology.

TherOx AOE Technology

Formulation

The TherOx skin cream is an oxygenated emulsion, which is stored under pressure in a small dispensing container. The oxygenated emulsion consists of a dispersed phase of perfluorocarbon droplets encapsulated within an aqueous continuous phase. The chemical ingredients of the emulsion include perfluorocarbon (PFC), water, humectants, lubricity enhancers, and emulsion stabilizers (surfactants). The PFC base is chosen for its high oxygen solubility and chemical inertness. Mechanical agitation and homogenization of the heated ingredients forms a stable suspension of PFC microdroplets within the aqueous base. This emulsion is thermally and mechanically stable and will not separate into its constituent phases unless subjected to extreme conditions. Figure 4 represents a schematic picture of the stabilized emulsion. Small, discrete PFC droplets, shown in white, are depicted within the continuous aqueous phase, shown in blue. A surfactant shell surrounds each PFC droplet, encapsulating the dispersed PFC with a complex lamellar structure of surface-active stabilizers. These protective shells act to repel one another within the emulsion, preventing the microdroplets from coalescing and thereby imparting stability to the emulsion. Oxygen is added at high concentration during a secondary process after emulsification.

Figure 4: Idealized schematic of oxygenated emulsion.



Basic structure of the TherOx AOE. Dissolved oxygen is concentrated in high-solubility PFC droplets that are stabilized by emulsifying agents within an aqueous base.

The emulsion absorbs readily into the skin for maximum oxygen delivery. PFC content can be varied to change the oxygen capacity; unlike traditional blood substitutes and other PFC-containing products, the TherOx AOE contains relatively high levels of perfluorocarbons, for maximum oxygen capacity. The secondary and tertiary formulation components can be changed within a reasonably wide degree of freedom to change the sensory and absorption characteristics of the products. TherOx has performed extensive formulation work that demonstrates this flexibility.

The AOE project was initiated at TherOx with a focus on wound care applications, based upon the excellent results observed in wound healing studies using hyperbaric chambers. This effort has produced a wound care formulation that has demonstrated wound healing acceleration in second-degree burns and partial thickness wounds, as observed in pre-clinical trials. The TherOx wound care formulation is somewhat thicker to apply than the base skin care formulation, and is used as a salve. The wound care emulsion will absorb into the skin over time rather than immediately and is ideal for use under a simple dressing such as non-stick gauze.

The opportunity for the AOE in the skin care and cosmeceutical markets has spurred the development of several formulation variations designed for healthy, intact skin, including the incorporation of many functional additives to enhance moisturization, lubricity, and rapid absorption. The emulsion is compatible with multiple sunscreen packages as well. The base formulation can be thought of as a platform or vehicle for other components, either pharmacological or cosmeceutical in nature, including topical anesthetic agents, analgesics, and antibiotics. Against the backdrop of a marketable and appealing skin care treatment, a high concentration of oxygen is delivered to the skin.

Oxygen Content

The oxygen content of the packaged emulsion is determined by several key factors. The PFC content in the formulation is critical because the oxygen solubility of perfluorocarbons is approximately 10-20 times greater than water. Choice of packaging is crucial as well; oxygen will remain in solution only if the emulsion is stored under pressure until ready for application.

The standard processing conditions for the emulsion require oxygenation at high pressure. A typical equilibrium concentration of dissolved oxygen for the AOE is 1.8 ml O₂ (STP) / ml emulsion for the base formulation, or three hundred times the amount of oxygen contained in a glass of water. The oxygen content may be varied easily by adjusting either the emulsion formulation or the processing conditions.

The emulsion must be packaged under pressure for the dissolved oxygen to persist in solubilized form. The container pressure must be equal to or greater than the oxygenation pressure to prevent outgassing. For low-pressure packaging options, the oxygen charging pressure can be lowered. TherOx currently uses the Advanced Barrier System (ABS) canister for the emulsion. This packaging option is commercially available and readily adapted into any high-volume manufacturing facility.

Oxygen Transfer Mechanism

Oxygen transfer from the cream into the skin occurs via diffusion and convection. Diffusion describes the molecular migration of oxygen from the cream into the skin, and is proportional to the large oxygen concentration gradient between the applied emulsion and skin tissues. Duration of effect over hours or even days has been observed *in vitro*, due to the characteristically slow diffusion process. A second important oxygen transfer process occurs via convection, wherein the cream is absorbed directly into the skin and transports the solubilized oxygen directly to the tissues. Rapid absorption of the cream, which occurs on a time scale much faster than diffusion, ensures efficient delivery of the cream's oxygen load to the application area.

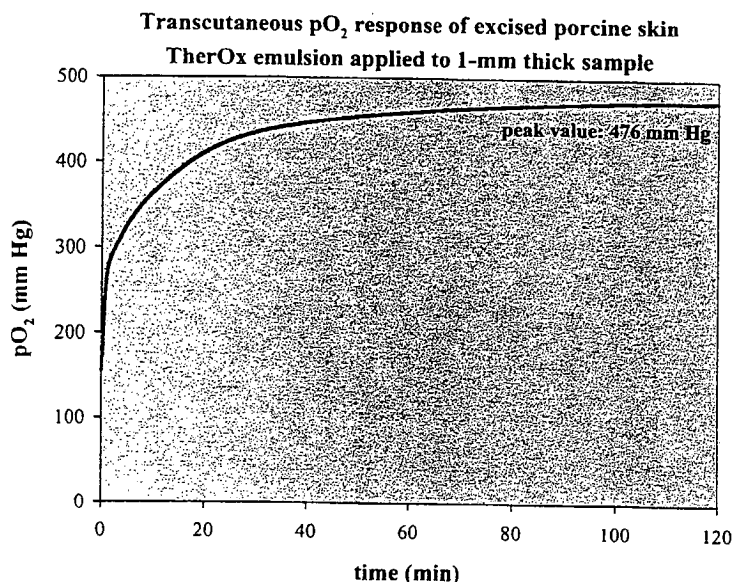
The combination of diffusive and convective transfer maximizes the effective dose of oxygen to the skin while minimizing the amount of oxygen lost to the ambient surroundings during dispensation and delivery. Because the outer skin epidermis is supplied oxygen from the surrounding air and not the vascular system, a significant enhancement of tissue oxygenation is realized upon application of the emulsion. The AOE formulation can be modified for rapid or slow, sustained absorption depending upon the desired rate of oxygen transfer.

Viewed in this sense, the emulsion could be described as a delivery system for oxygen and other desired additives.

Oxygen Transfer Data

TherOx has developed a series of bench tests to measure oxygen transfer through excised skin samples and polymeric skin substitutes. Figure 5 displays oxygen transfer data for a wound care version of the AOE after application onto a 1-mm thick section of excised porcine skin. In the figure, the tissue oxygenation level, or pO_2 , is monitored after the emulsion is applied at time zero. After a few minutes, a sharp increase in oxygenation is observed from ambient conditions to an elevated, sustained peak value approaching 500 mmHg. Because the skin sample is excised and non-absorbent, the oxygenation level can be sustained for many hours after only one emulsion application. Recalling the important literature measurement reported by Stucker *et al.*, the uppermost 400 microns of skin layers are supplied oxygen by the environment, while deeper layers are supplied oxygen by the vascular system. On skin samples greater than twice this thickness (1 mm), TherOx has demonstrated that the oxygenated emulsion penetrates the tissue and elevates pO_2 levels for a sustained period. These bench tests, combined with other corollary data, show proof of concept that the technical goal of delivering a local hyperbaric environment without the need for a pressurized chamber has been achieved.

Figure 5: pO_2 response of excised skin tissue after application of oxygenated emulsion.



A dramatic increase in tissue oxygenation is observed within minutes of application, and is sustainable over a period of hours. These results underscore the uniqueness of the TherOx technology as well as the untapped market demand for an efficacy-based oxygenated skin cream. *Source: TherOx.*

Laboratory Testing

Shelf Life

- Accelerated aging: the AOE is subjected to three tests for accelerated aging evaluation: exposure to constant elevated temperature, thermal cycling, and freeze/thaw cycling. Constant temperature and thermal cycling samples are evaluated after one, two, and three months. The three-month mark is considered equivalent to a two-year shelf life.
- Evaluation criteria include evaluation of consistency and appearance, including color and scent, oxygen content, visual, and microscopic observations for possible emulsion separation, and stability under centrifugation.
- The AOE exhibited no changes from baseline after completion of accelerated aging evaluation. Real-time aging data after one year exhibited no changes from baseline.

Biocompatibility and Safety Testing

Biocompatibility and safety assessment of TherOx topical emulsions for wound care and skin care products have been evaluated in accordance with International Organization for Standardization (ISO) and FDA for materials/devices to be used on intact and breached or compromised surfaces. Antimicrobial effectiveness testing was conducted in accordance with USP 25. The ingredients used in the skin and wound care formulations are rather similar, the differences being in the preservatives and humectants. The following bullet points represent the highlights of this testing:

- ISO Sensitization Test in Guinea pig (maximization method) was conducted in accordance with ISO 10993: Biological Evaluation of Medical Devices, Part 10: Test for Irritation and Sensitization. Under the condition of this study, the test solution showed no evidence of causing delayed dermal contact sensitization in the guinea pig.
- ISO Acute Intracutaneous Reactivity testing was performed based on the requirements of the ISO 10993: Biological Evaluation of Medical Devices, Part 10: Tests for Irritation and Sensitization, but modified for a chemical solution. Under the condition of this study, no evidence of erythema or edema was observed.
- The emulsion was assayed in accordance with USP 25 <51> Antimicrobial Effectiveness Testing, Category 2. Results showed that the test article meets all USDP requirements for Antimicrobial Effectiveness Testing, Category 2.
- In testing conducted by Hill Top Research, Inc., the emulsion was determined to be non-comedogenic during a 4-week evaluation of thirteen volunteers, as determined from microcomedone counts from follicular biopsies.

IV. EFFICACY STUDIES

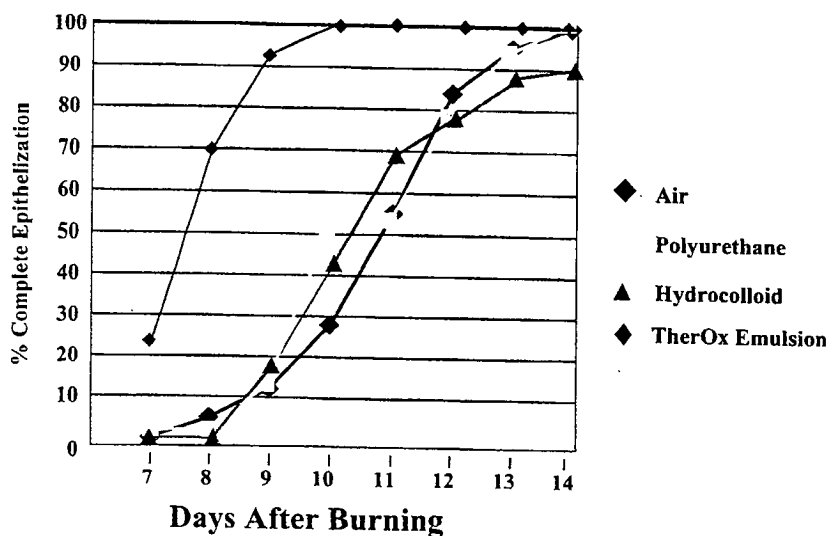
Preclinical Trials

TherOx has investigated the potential for the oxygenated topical emulsion as a wound healing agent in pre-clinical studies conducted jointly with the University of Miami. These studies were funded in part by an SBIR award from DARPA.

A second-degree burn model and a partial thickness wound model were chosen for evaluation, using the posterior back region of young swine. Results for both studies show that wounds treated with the oxygenated emulsion heal dramatically faster than non-treated control wounds. Full study reports and data are available under confidentiality.

Figure 6 depicts gross healing results for the burn study, showing the % of wounds completely re-epithelized on each day of progressive healing. The stringent level of evaluation requires that no defects in the repaired epidermis are present for a wound to be counted as "re-epithelized." In addition to the oxygenated emulsion results, shown in blue, historical data are included for the same model⁹. As shown, compared to non-treated control wounds, as well as traditional dressing materials (occlusive and hydrocolloid), the oxygenated emulsion significantly enhances healing rates.

Figure 6: Evaluation of burn wound healing in a pig model.



Each data point represents 40 wounds. Statistically significant ($P < 0.001$) results are observed for each day of progressive healing shown above (days 7 – 10), demonstrating dramatic improvement in wounds treated with the AOE. Historical data using the same experimental model show that the TherOx AOE outperforms the current standard of care. *Source: TherOx.*

In matched controls utilized in the blinded protocol, statistical significance was achieved in all days of progressive healing with the oxygenated emulsion. Additional data that can be provided show significant upregulation of both collagen and vascular endothelial growth factor in wounds treated with the oxygenated emulsion. Results from a partial thickness wound healing study show similar results, with significantly accelerated healing observed in the oxygenated emulsion treatment group.

⁹ Davis SC, Mertz PM and Eaglstein WH (1990). *J. Surg. Res.* 48:245 – 248.

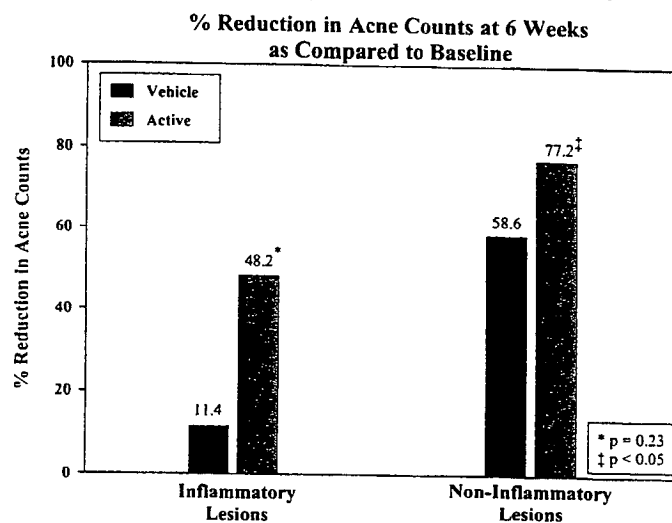
Clinical Experience

Acne Treatment

TherOx has conducted a pilot study on the effectiveness of the AOE in acne treatment over a six-week trial period. This study was performed by a prominent dermatologist, yielding promising results by reducing the level of non-inflammatory acne lesions over a 6-week period.

The most valuable data in most acne studies is the blinded investigator acne lesion counts. This is the only truly accurate data and is used as the standard assessment in all prescription acne products being evaluated for FDA approval. The active and vehicle groups were well balanced in terms of lesion counts during baseline readings, so a fair assessment of each agent could be made. A decrease in both inflammatory and non-inflammatory acne counts was observed at week 6; analysis with a two-tailed t-test revealed a statistically significant decrease in noninflammatory lesions in the active group at $p=0.05$. There was a trend toward improvement with the active group in inflammatory lesion counts, but statistical significance was not reached ($p=0.23$) due to fewer overall lesions of this type in the subject population. Figure 7 presents these data as the percent reduction in acne counts for both lesion types as compared to baseline; i.e., 100% reduction would represent 0 counts and complete resolution of the condition.

Figure 7: Results for TherOx AOE acne study at 6 week evaluation.



Both the oxygenated emulsion and vehicle groups experienced substantial acne count reductions at week 6, particularly in non-inflammatory lesions. The oxygenated emulsion outperformed the vehicle with respect to both lesion types – statistical significance was achieved in the non-inflammatory group with $p < 0.05$ and would be expected to reach significance with a higher total count of inflammatory lesions. *Source: TherOx.*

The eradication of noninflammatory acne is a significant benefit. The microcomedone is felt to be the precursor of all acne lesions, both inflammatory and noninflammatory. It is the microcomedone that is the site of action for the most potent group of topical anti-acne prescription medications, known as retinoids (Retin-A, Differin, Tazorac). **If the oxygen-containing emulsion could be documented to be efficacious against noninflammatory acne in a large scale more definitive study, it would be a valuable adjunct to the dermatologic acne armamentarium.**



*Innovators in
Aqueous Oxygen
Therapy*

Internal Memo

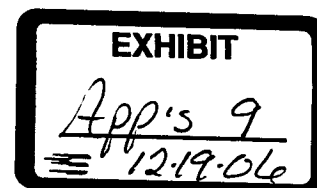
Date: November 20, 2002
To: Skin Care Program
CC:
From: Jeff Creech
RE: Proposed test market plan for Oxium cans

Summary

A test market/market evaluation study for the oxygenated topical emulsion is proposed for the skin care market segment, involving six Southern California locations in the specialty market channel. The strategy is to use a limited product release of the Oxium can to evaluate market feasibility, esthetician and client product acceptance, price points, and consumer perception of an oxygenated skin care line in a realistic market setting. This critical information will be obtained at low cost and minimal incremental resource from TherOx, as reflected in the associated project budget. Kim Root will coordinate sales and marketing, and product will be manufactured with pilot-scale equipment at TherOx. Support materials for the Oxium release will consist of a brochure, product sheet, questionnaires, and a letter of explanation for the limited test market. Product will be offered for a prescribed time period, three months, and will not exceed 2,000 cans. A price point will be set after initial discussions with the skin care professional staff at the participating sites.

Product Release

Product will be offered to sites in a two-stage process: first, an initial supply of cans will be provided at no cost to estheticians for use as an oxygenated facial service. After a trial period of about two weeks, additional product will be offered for sale. The emulsion may be sold by the spa as an oxygen facial or offered for take-home use as a night cream. TherOx will provide questionnaires for consumers to fill out and return for product feedback, and to ensure compliance will offer a modest product rebate after receiving the completed forms. The proposed target market includes three high-end spas and three physician offices. The six identified sites are spread geographically in Beverly Hills, Santa Monica, Orange, Mission Viejo, Seal Beach, and Claremont.



TherOx0337

Marketing Support Materials

The following materials will be included in a product folder offered to the estheticians:

- Product Brochure (overview, benefits of hyperbaric oxygen, medical tie-ins and backing, oxygen content and differentiation from other "oxygen" products, expected results from product use (one set of before/after photos))
- Product Sheet (picture of can, ingredient high points, IFUs, suggested retail price, contact information) – this one-page glossy can be offered to each customer.
- Letter of explanation for test market (spell out explicit terms for product availability, two-stage rollout, and limited market window for evaluation).
- Questionnaires will be provided after the introductory period and will probe for product feedback from both estheticians and end users. Draft copies of each of these questionnaires are provided as an attachment.

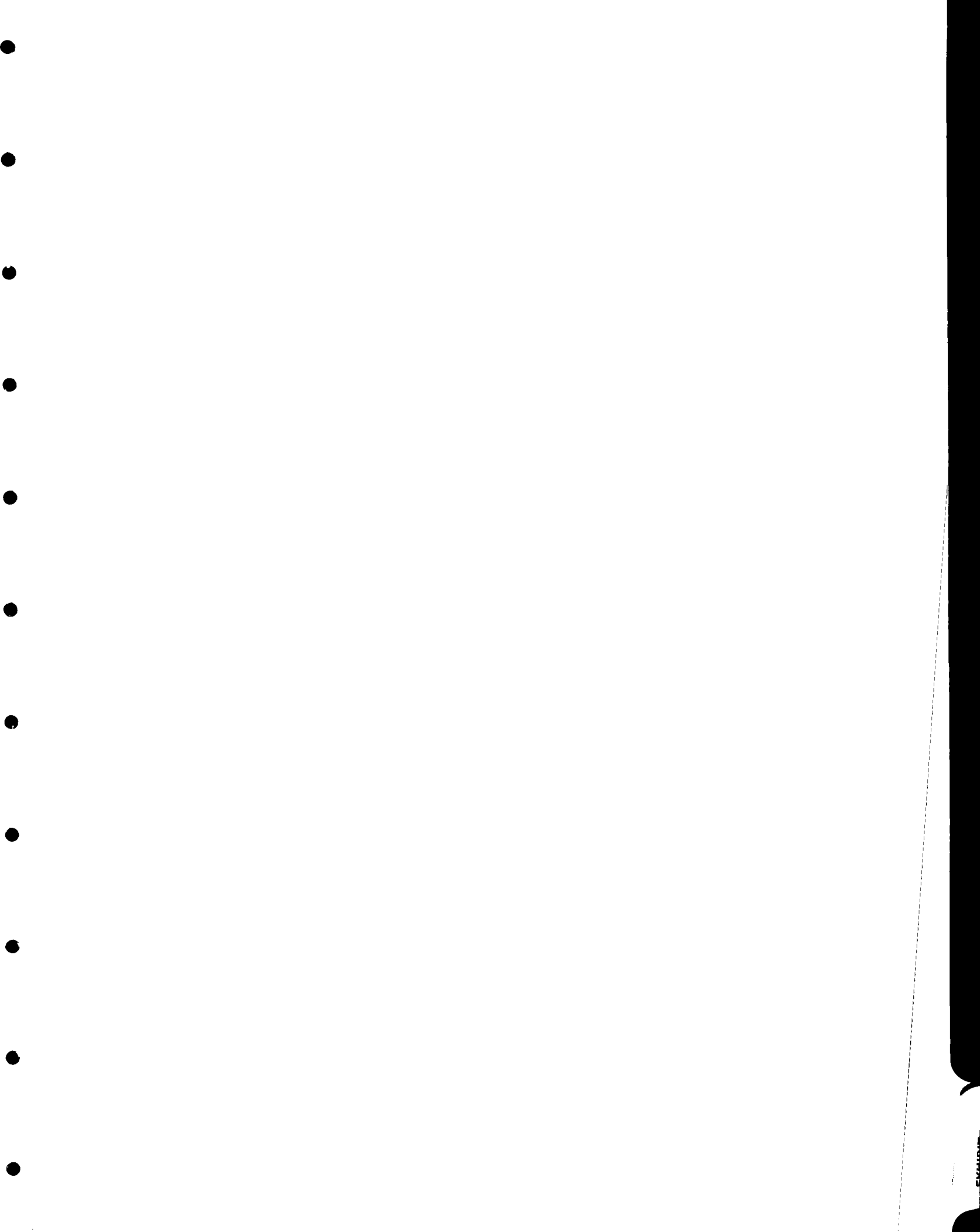
These materials will be prepared using TherOx resources and limited professional printing services.

Manufacturing and Quality Assurance

Pilot equipment will be used at TherOx to make sequential batches of oxygenated cream, packaged in the Oxium can. Each batch will be evaluated for oxygen content, stability, and consistency. Cans are 100% tested during processing to ensure that filling is complete and no bubbles are entrained in the product. A single batch produces approximately 80 filled 1 oz. cans. No manufacturing bottlenecks are anticipated that would delay product release or availability. The Oxium can contains all the required information as specified by the FDA guidelines for cosmetic labeling.

Legal

No legal or contractual impediments are anticipated that would delay product release. The few remaining tasks to be completed prior to release include the filing of two patent applications for the emulsion, expected in late December, and possibly obtaining a non-infringement opinion on the Oxium trademark with respect to previous filings for Oxy- trademarks by SmithKline Beecham.



mtg w/ Karen Jones

1/3/02

secondary research:

dermatology offices - SoCal

how to narrow down practices?

size of the practice?

spa lists → SIC codes?

spas are listed in the same group
as beauty salons — how to differentiate

CD and book available for

state of CA for approx. ~ \$900

Physicians & Surgeons Directory

\$700

cap color on can

check w/ CCL

naming ideas

concern over O_2F_p (O_2 fix?)

price points — how do we arrive at the
right number?

EXHIBIT

App's 10
12.19.06

1/2/02

need help w/ materials:

brochures

order forms

case studies

product description sheets

web page:

dedicated URL for product

link to TherOx

quantities for support materials

Ad-hoc mkg info 1/14/02

Product - sold in spas

aesthet.

derms

physic.

← is this important
(medical connotations?)exclusive, high-end product{ unique - high amounts of oxygen
without the H₂O₂purpose - (anti-aging mask/cream
application)→ is this important
(convey it in the name)→ medically backed technology
→ important to the name

let me suggest some names

O₂ Fx

Breathe

BiO₂

Aria

O₂ EssentialsO₂ Renewal

Oxygenesis

Oxology

Derm Ox

Soufflé

Becky female age 29

- yes, influenced by physicians would buy if recommended
- name w/ medical connotation
 - too clinical = negative
 - just depends
 - too medicinal-harsh, strong, foul odors
- name w/ oxygen
 - O_2 helpful as a marketing tool
- medical device company lends credibility

O_2Fx - cute, but what about older women hair stuff (sprays + gels)

BiO_2 - like it better - sounds more organic

O_2 Essentials - brand confusion - associated w/ another line of products - drug stores thinks of Target

O_2 Renewal - renewal products - brand confusion

Oxygenesis - oxyperds, etc. associates oxy - w/ anti-acne products

Oxology - too medical and sounds like toxology - "hey, you want your face to melt off, use this."

DermOx - too medical (same as above)
dermablend brand confusion

Southlé - ~~if~~ sounds like - there's something wrong with it - it's just not right.

Breathe - that's better. you have the whole connotation of air and the word is pleasing, relaxing

Aria - one drawback - a lot of icky diseases that end in -ria

BiO₂ / Breathe

"~~There~~ They Call me
Oxy - mellow to the
tune of mellow Yellow
- Donovan?

bottle floating thru air

Christy age 39

favorites:

① Oxygenesis

② O₂ ~~Renewal~~ Renewal

what about O₂ Genesis?

- name - medical connotation
spa - ~~not~~ might be nice to have
some medical connotation
derms - not necessary - already
credible
- professional advice important
- name should convey something
about oxygen
- cosmetic > useful to know
that the company making it
was medical

Names

O₂ Fx - its ok. sounds like a medicine
kind of negative - that's not
great - sounds too medical

O₂ Essentials - like it better - this is
more in the lines of cosmetics but
has something special in the
ingredients -

Oxygenesis - hum - not bad at all
genesis kind of implies
rebirth - sounds really
appealing -

Derm Ox - don't like that one -
reminds me of some kind
of ointment - medicine-y

Breathe - sounds too pedestrian

BiO₂ - this kind of reminds me
Bioderm - brand confusion -
not bad - it's o.k. not great

O₂ Renewal - not bad - that's pretty
good. likes the combination
of the wordplay O₂ + word.

Oxology - not so much - sounds like
a study or discipline
rather than the product

Soufflé - No! too fufu.

TherOx00526

Aria - interesting - I don't know -
sounds good but there's
something... no O₂ association
" + - 10. ... 1. 1

Lacey age 31

- medical backing or connotation w/ the ~~name~~
 - it depends. In my mind doctors recommend things for problems.
 - doesn't matter that it has to have medicine - for problem skin only.
- oxygen in the name
 - oxygen is positive, it's a good thing ~~that~~ not essential - a lot of benefit to it
- backed by a medical device company
 - lends it some credibility
 - but people are interested in lining their pockets w/ money
 - medical > neutral or bad

Names

O₂Fix - it's o.k. "Fix" could be a "fix" or "fix something that's broken" - like O₂ as part of the name

O₂ Essentials - I think that would be a good name for a line ~~to~~ - ~~it's~~ it's pretty good - O₂ + word combination is good - basic routine product

Oxygenesis - I hate the Oxy. Connotes Oxyclear, oxy wash, acne medicines, etc.

DermOx - Ewwh! bad sounding - dermatology connotes skin problems - something to fix bad skin

Breathe - it's all right. gives me the impression of an air freshener or something to relieve congestion

BiO₂ - I like that - I like the O₂ bit - scientific nature without seeming medical - scientific connotation is good

O₂ Renewal - if it replenishes the oxygen in your skin, then it's o.k. It might imply the product does something it doesn't do.

Oxology - No. It doesn't make any
bit of sense that that is
the name of a product -
-ology is the study of something

Souffle - that is completely retarded

Aria - has a pleasant sound - light
and airy - but it doesn't
have anything to do with
the product

Two best

① BiO₂

② O₂ Essentials

Danielle 30

- name w/ medical connotation
doesn't matter ; neutral
- Oxygen - important and useful
think of O_2 as pure
- medical company - lends it credibility
over cosmetic company

Names

O_2 Fx - a little too abstract - Fx makes
you think of the TV channel/
a little too clinical

O_2 Essentials - that's o.k. seems a little
new - agy - reminds of essential
oils

Oxygenesis - ~~a~~ kind of ~~the~~ like that -
sounds like something kind
of fresh and new

Deerm Ox - fair - slightly abrasive
sound to it - harsh -

Breathe - sounds a little too wishy-washy
to me - corny

BiO₂ - ooh - I like that a lot -
its concise, its got the oxygen
in it, and bio of course
for life

O₂ Renewal - eh, doesn't do anything
for me - sounds like an
advertisement

Oxology - that's kind of catchy - I
like the way it sounds - although
it sounds like it would be the
study of something rather than
a product

Soufflé - No. that's random - No No No

Aria - I don't get the connection
disconnected completely

- ① BiO₂ is no. 1
- ② Oxology

Juliette age 33

- medical-backing name
neutral - all depends
- oxygen - good pure
positive connotation
- medical company backing
is good thing

NAMES

O₂Fx → I don't know - sounds more like
a movie - no connection w/
the name - not bonding

O₂ Essentials - works better - sounds
nicer - essentials - combination
of O₂ w/ another

Oxygenesis - definitely no - oxy reminds
me of oxyclean - acne medicine
genesis - bible or musical
group

TherOx00532

DermOx - o.k. medical - I like that is good
if brings medical and serious
connotation

Breathe - hum - I don't know -

sounds like a perfume - lovely word
doesn't do it for me.

picture
it like
chemical
formula
look blue
on white
label

BiO_2 - that's nice - "brings to mind
 BiO_2 white lab coats serious thinking
about the rejuvenation of my
skin" like that one

O_2 Renewal - good but not great -
nice but not sexy - Avon
body - too obvious

Oxology - No - up there w/ oxygenesis
something to do w/ their
feet or oncology not good
at all

Souffle - wild laughter - No f. way

Aria - like them in my operas
"Aeria" but no - but wait - in
spa context, maybe it is
good - change the spelling

top 2 = BiO_2
① Deum Ox
② "Aeria" / ~~Willa~~

Medical Skin Care Lines

‡ Obagi - Hydroquinone/Tretinoin/TCA *trichloroacetic acid*

‡ Biomedic - Glycolic Acid/Salicylic Acid

Acid/Retinols

‡ *(over company)* Neova - Copper Peptides

‡ ICN Pharmaceuticals - Glycolic

Acid/Hydroquinone *(HQ)*

‡ Allergan - Glycolic Acid

exfoliation

EXHIBIT

App's 11
10-19-06

TherOx0494

Aesthetic Skin Care Lines

Dermalogica

Jan Marini Skin Research

lipid-soluble c Penicillin (sp?)

Skinceuticals

Cellex C *- water-soluble c*

Karin Herzog

Internal Memo

Date: March 22, 2002
To: Design History File
CC: Jeff Creech, Paul Zalesky, Kevin Larkin, Margaret Kivinski
From: Amy DeWinter
RE: O₂ skin care naming project

Following a lengthy creative process, the name **Oxium** has been selected as the trade name for the O₂ skin care product line.

A thorough marketing evaluation was conducted by Fieldwork Los Angeles. Seventeen individuals from the skin care focus group conducted in October 2001 participated, with eight women in the 30-45 age group, and nine women in the 45-60 group. Four names were tested, along with two mock logo ideas for each name. The names tested were Aeragen, Oxium, Ingenue, and Verdani. Aeragen tested most favorably overall, with Oxium as a strong second. Oxium tested slightly better than Aeragen in the demographically important 45-60 age group. In addition, one of the two Oxium logos tied for best overall logo amongst those presented.

A trademark screening was performed on all four name candidates. Aeragen, which tested as the consumers' favorite name, exhibited substantial risk from a trademarkability standpoint. In contrast, Oxium demonstrated the least amount of trademark conflict in both our class of goods (IC 003) and in other classes in terms of similarities of goods and market channels.

The results of the Fieldwork evaluation and internal trademark search demonstrate that Oxium is the best choice for the O₂ skin care trade name when all information is considered. Oxium will be used as the product line name, with individual product descriptions to differentiate the O₂ Mask and the O₂ Night Cream. A trademark application has been submitted, and related marketing projects (logo development, product labeling, etc.) are moving forward.

EXHIBIT

App's 12
10.19.06

TherOx00548

Results of Naming Survey with Focus Research

Name	Age	GRP	Aeragen	Oxium	Ingenue	Verdani	Most	Least	H	J	M	O	P	S	T	V	Most	Least
Lori Bissonette	45	2	1	5	4	1	Oxi	Ver	1			1	1			1	H	M
Sara Dolan	39	2	4	2	4	1	Aer	Ver	1			1	1		1		H	V
Karen Ratcliff	38	2	4	3	2	2	Aer	Ver		1	1	1			1		T	S
Kristin Ellis	33	2	4	2	4	3	Ing	Ver	1			1	1			1	O	S
Alison Pearson	42	2	4	2	4	1	Ing	Ver		1		1	1				O	S
Mirta Sierra	30	2	1	2	4	3	Ing	Ver	1			1	1				O	J
Angelita Lumanog	41	2	5	2	2	3	Aer	Ver	1		1		1				H	V
Michelle Holland	34	2	5	4	2	3	Aer	Ver	1		1		1				H	S
Wendy Rogers	39	2	4	5	1	1	Oxi	Ing	1			1	1				T	P
Janey Grier	34	2	4	2	1	2	Aer	Ing	1			1	1				O	J
Michelle Yamamoto	38	2	5	2	3	2	Aer	Oxi		1	1		1			1	J	S
Janet Gobel	38	1	3	2	1	3	Ver	Oxi										
Group 1 averages (n=9)			3.4	3.9	2.8	2.3			8	1	2	7	6	3	9	0		
Group 2 averages (n=8)			3.5	2.9	2.6	1.9			5	3	2	6	6	2	6	2		
Total averages			3.5	3.4	2.7	2.1			16	4	5	15	15	5	17	3		

Favorites	Group 1	Group 2	Total
Aeragen	3	4	7
Oxium	3	2	5
Ingenue	1	2	3
Verdani	2	0	2

Least Favorites	Group 1	Group 2	Total
Aeragen	1	0	1
Oxium	2	1	3
Ingenue	3	2	5
Verdani	3	5	8

PROJECT INPUT

Please enter your input in the column on the right-hand side:

Client:	TherOx, Inc.
Product:	Oxium - highly oxygenated skin care line (mask and night cream)
Assignment:	Produce corporate identity and market support materials for Southern California test market launch.
Product Positioning:	Oxium is a high-end medically-backed skin care line focused on delivering large amounts of molecular oxygen to the skin. This product will be positioned as a prestigious skin care product.
Prioritized Objectives: (specifically, what must this project do?)	Create corporate identity suitable for product positioning and planned market channel acceptance. Create marketing materials: product labeling, product brochure, competitive piece.
Target Audience:	Primarily women who visit high-end spas and dermatology/plastic surgery practices for their skin care products and services. Projected age demographic: 35-60.
Unique Selling Proposition:	Oxium is a skin care product line manufactured by a medical technology company specifically focused in oxygen technology. This product is the only skin care product that can deliver such large amounts of oxygen to the skin.
Takeaway Message:	Unique patented formula that delivers large amounts of molecular oxygen to the skin, with no hydrogen peroxide or other bleaching additives.
Features: (inherent product/service facts)	<ol style="list-style-type: none">1. Contains 1.5 cc of oxygen per 1 cc of cream.2. The formulas have no added colors or fragrances.3. The formulas are oil-free.4. The formulas contain vitamin E.
Benefits: (how these features satisfy needs of customer)	<ol style="list-style-type: none">1. Promotes rejuvenated appearance of skin2. Promotes a clean look and feel to the skin.

Andersen Jones Partners, Inc.
31726 Rancho Viejo Road Suite 207
San Juan Capistrano CA 92675

tel 949.240.6802
fax 949.240.8437
www.andersenjones.com

PROJECT INPUT

Competitive Environment: Although the overall skin care market is large and there is much product saturation, there are few products that actually contain oxygen and claim penetration to the skin.

Pricing: Estimated retail pricing for the night cream (1 oz.) will be \$84. Est. retail pricing for the mask (1 oz.) will be \$42.

☒ Premium
☐ Competitive
☐ Lowest

Our Competitive Advantages: Most "oxygen" products and treatments actually contain hydrogen peroxide rather than stabilized oxygen. Oxium contains high concentrations of medical grade molecular stabilized oxygen.

Our Product/Service Weakness: TherOx is not a skin care company, and therefore does not have the same technological, marketing, or financial resources as an established skin care company.

Exclusive Features: Patented oxygen technology with the ability to deliver large amounts of molecular oxygen to the skin.

Image or Tone Portrayed in Advertising: Natural, puristic, and clean look and feel.

Mandatory Inclusions: Tagline must be related to oxygen.

Additional Instructions:

Project Input Approved By:

Client: TherOx – Amy DeWinter, Marketing Manger
Agency:

Date: 3/26/02
Date:

TherOx00551

FINAL COPY
SUBMITTED BY ANDERSEN JONES
MAY 13, 2002

DIRECTIONS FOR USE

Apply a small amount to the skin.

PRECAUTIONS

Keep out of reach of children.
Do not use if the container is damaged.
Do not use if the product is expired.
Do not use if the product is discolored.
Do not use if the product has a strong odor.
Do not use if the product is contaminated.

WARNING: CONTENTS UNDER PRESSURE.
DO NOT PUNCTURE OR INCINERATE. DO NOT
STORE AT TEMPERATURE ABOVE 120° F.
KEEP OUT OF REACH OF CHILDREN.
USE ONLY AS DIRECTED. DO NOT APPLY TO
BROKEN OR IRRITATED SKIN. IF RASH
DEVELOPS, DISCONTINUE USE.

Net Contents 1.0 FL OZ (29.6ml)

OXIUM™

SkinCare Through
Oxygen Science

Advanced Oxygen
Renewal Complex

NET CONTENTS 1.0 FL OZ 29.6ml

EXHIBIT

App's 13
10-19-02

TherOx00750

Aeragen

Oxygenated Skin Care

Aeragen

Oxygenated Skin Care



Ingenue

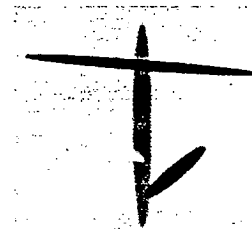
INGENUE



OXYGENATED SKIN CARE

OXIUM

Oxygenated
Skin
Care



Oxium



TherOx, Inc.
2400 Michelson Drive
Irvine, CA 92612-1310
United States of America

I N V O I C E

Invoice: IN1001 Revision:
Invoice Date: 02/28/03 Page:
Print Date: 12/27/04

Bill To: 00010004

Sold To: 00010004

Facials by Kelly
2461 Marian Ave.
Anaheim, CA 92804
United States of America

Facials by Kelly
2461 Marian Ave.
Anaheim, CA 92804
United States of America

Sales Order: SO10021
Order Date: 02/28/03
Salesperson(s):

Ship Date: 02/28/03
Purchase Order:
Ship To: 00010005
Ship Via:
BOL:
FOB Point: Shipping Point

Credit Terms: NET 0
Net Zero

Resale:
Remarks: Payment through AMEX

Item Number	UM	Shipped	Backorder	Tax	Price	Extended Price
90100-0001	EA	1.0	0.0	no	540.00	540.00
Oxium, Night Cream						

Non-Taxable: 540.00
Taxable: 0.00
Tax Date: 02/28/03

Currency: USD

Line Total:	540.00
Discount:	0.00
Freight 10 :	0.00
Duties 20 :	0.00
Special 30 :	0.00
Total Tax:	0.00
Total:	540.00

EXHIBIT

App's 14
12-19-04

TherOx00755

TherOx, Inc.
2400 Michelson Drive
Irvine, CA 92612-1310
United States of America

I N V O I C E

Invoice: IN1002 Revision:
Invoice Date: 03/14/03 Page:
Print Date: 12/27/04

Bill To: 00010006

Sold To: 00010006

AROMATIQUE
250 W. FIRST ST. #12
CLAREMONT, CA 91711
United States of America

AROMATIQUE
250 W. FIRST ST. #12
CLAREMONT, CA 91711
United States of America

Sales Order: SO10022
Order Date: 03/12/03
Salesperson(s):

Ship Date: 03/14/03
Purchase Order:
Ship To: 00010006
Ship Via:
BOL:
FOB Point: Shipping Point

Credit Terms: NET 0
Net Zero

Resale:
Remarks: Credit Card Payment 4024421000306201

Item Number	UM	Shipped	Backorder Tax	Price	Extended Price
90100-0001	EA	1.0	0.0 no	540.00	540.00
Oxium, Night Cream					

Non-Taxable: 540.00
Taxable: 0.00
Tax Date: 03/14/03

Currency: USD Line Total: 540.00
0.00% Discount: 0.00
Freight 10 : 0.00
Duties 20 : 0.00
Special 30 : 0.00
Total Tax: 0.00
Total: 540.00

TherOx00756

TherOx, Inc.
2400 Michelson Drive
Irvine, CA 92612-1310
United States of America

I N V O I C E

Invoice: IN1008 Revision:
Invoice Date: 04/05/03 Page:
Print Date: 12/27/04

Bill To: 00010007

Sold To: 00010007

Essentials Salon
Mary Ruth Rivet
311 Main Street # 7
Seal Beach, CA 90740
United States of America

Essentials Salon
Mary Ruth Rivet
311 Main Street # 7
Seal Beach, CA 90740
United States of America

Sales Order: SO10028
Order Date: 04/05/03
Salesperson(s):

Ship Date: 04/05/03
Purchase Order:
Ship To: 00010007
Ship Via:
BOL:
FOB Point: Shipping Point

Credit Terms: NET 0
Net Zero

Resale:
Remarks: Hand Delivered

Half a case

Item Number	UM	Shipped	Backorder	Tax	Price	Extended Price
90100-0001	EA	0.5	0.0	no	540.00	270.00
Oxium, Night Cream						

Non-Taxable: 270.00
Taxable: 0.00
Tax Date: 04/05/03

Currency: USD Line Total: 270.00
0.00% Discount: 0.00
Freight 10 : 0.00
Duties 20 : 0.00
Special 30 : 0.00
Total Tax: 0.00
Total: 270.00

TherOx00757

TherOx, Inc.
2400 Michelson Drive
Irvine, CA 92612-1310
United States of America

I N V O I C E

Invoice: IN1009 Revision:
Invoice Date: 04/28/03 Page:
Print Date: 12/27/04

Bill To: 00010006

Sold To: 00010006

AROMATIQUE
250 W. FIRST ST. #12
CLAREMONT, CA 91711
United States of America

AROMATIQUE
250 W. FIRST ST. #12
CLAREMONT, CA 91711
United States of America

Sales Order: SO10030
Order Date: 04/28/03
Salesperson(s):

Ship Date: 04/28/03
Purchase Order:
Ship To: 00010006
Ship Via: COD
BOL:
FOB Point: Shipping Point

Credit Terms: NET 0
Net Zero

Resale:
Remarks: COD

Item Number	UM	Shipped	Backorder	Tax	Price	Extended Price
90100-0001	EA	1.0	0.0	no	540.00	540.00
Oxium, Night Cream						

Non-Taxable: 545.50	Currency: USD	Line Total:	540.00
Taxable: 0.00	0.00%	Discount:	0.00
Tax Date: 04/28/03	Freight 10 :		0.00
	Duties 20 :		0.00
	Special 30 :		5.50
	Total Tax:		0.00
	Total:		545.50

TherOx, Inc.
2400 Michelson Drive
Irvine, CA 92612-1310
United States of America

I N V O I C E

Invoice: IN1010 Revision:
Invoice Date: 05/13/03 Page:
Print Date: 12/27/04

Bill To: 00010008

Sold To: 00010008

Beverly J. Page
4220 Laurel Canyon Blvd. #4
Studio City, CA 91604
United States of America

Beverly J. Page
4220 Laurel Canyon Blvd. #4
Studio City, CA 91604
United States of America

Sales Order: SO10031
Order Date: 05/13/03
Salesperson(s):

Ship Date: 05/13/03
Purchase Order:

Credit Terms: NET 0
Net Zero

Ship To: 00010009
Ship Via:
BOL:

Resale:
Remarks: PAY BY CREDIT CARD

FOB Point: Shipping Point

Item Number	UM	Shipped	Backorder	Tax	Price	Extended Price
90100-0001	EA	1.0	0.0	no	540.00	540.00
Oxium, Night Cream						

Non-Taxable: 540.00	Currency: USD	Line Total:	540.00
Taxable: 0.00	0.00%	Discount:	0.00
Tax Date: 05/13/03		Freight 10 :	0.00
		Duties 20 :	0.00
		Special 30 :	0.00
		Total Tax:	0.00
		Total:	540.00

TherOx, Inc.
2400 Michelson Drive
Irvine, CA 92612-1310
United States of America

I N V O I C E

Invoice: IN1011 Revision:
Invoice Date: 05/13/03 Page:
Print Date: 12/27/04

Bill To: 00010004

Sold To: 00010004

Facials by Kelly
2461 Marian Ave.
Anaheim, CA 92804
United States of America

Facials by Kelly
2461 Marian Ave.
Anaheim, CA 92804
United States of America

Sales Order: SO10032
Order Date: 05/13/03
Salesperson(s):

Ship Date: 05/13/03
Purchase Order:
Ship To: 00010005
Ship Via:
BOL:
FOB Point: Shipping Point

Credit Terms: NET 0
Net Zero

Resale:
Remarks: PAY BY CREDIT CARD

Item Number	UM	Shipped	Backorder	Tax	Price	Extended Price
90100-0001	EA	1.0	0.0	no	540.00	540.00
Oxium, Night Cream						

Non-Taxable: 540.00	Currency: USD	Line Total:	540.00
Taxable: 0.00	0.00%	Discount:	0.00
Tax Date: 05/13/03	Freight 10 :		0.00
	Duties 20 :		0.00
	Special 30 :		0.00
	Total Tax:		0.00
	Total:		540.00

TherOx00760

TherOx, Inc.
2400 Michelson Drive
Irvine, CA 92612-1310
United States of America

I N V O I C E

Invoice: IN1013 Revision:
Invoice Date: 07/15/03 Page:
Print Date: 12/27/04

Bill To: 00010006

Sold To: 00010006

AROMATIQUE
250 W. FIRST ST. #12
CLAREMONT, CA 91711
United States of America

AROMATIQUE
250 W. FIRST ST. #12
CLAREMONT, CA 91711
United States of America

Sales Order: SO10037
Order Date: 07/15/03
Salesperson(s):

Credit Terms: NET 0
Net Zero

Resale:
Remarks: Shipped COD

Ship Date: 07/15/03
Purchase Order:
Ship To: 00010006
Ship Via: Fed Ex Ground
BOL:
FOB Point: Shipping Point

Item Number	UM	Shipped	Backorder	Tax	Price	Extended Price
90100-0001	EA	1.0	0.0	no	540.00	540.00
Oxium, Night Cream						

Non-Taxable: 545.50
Taxable: 0.00
Tax Date: 07/15/03

Currency: USD

Line Total:	540.00
Discount:	0.00
Freight 10 :	5.50
Duties 20 :	0.00
Special 30 :	0.00
Total Tax:	0.00
Total:	545.50

TherOx, Inc.
2400 Michelson Drive
Irvine, CA 92612-1310
United States of America

I N V O I C E

Invoice: IN1014 Revision:
Invoice Date: 07/15/03 Page:
Print Date: 12/27/04

Bill To: 00010006

Sold To: 00010006

AROMATIQUE
250 W. FIRST ST. #12
CLAREMONT, CA 91711
United States of America

AROMATIQUE
250 W. FIRST ST. #12
CLAREMONT, CA 91711
United States of America

Sales Order: SO10038
Order Date: 07/15/03
Salesperson(s):

Ship Date: 07/16/03
Purchase Order:
Ship To: 00010006
Ship Via: Fed Ex Ground
BOL:
FOB Point: Shipping Point

Credit Terms: NET 0
Net Zero

Resale:
Remarks: reaminder amt. for Shipping and COD

Non-Taxable: 10.74
Taxable: 0.00
Tax Date: 07/16/03

Currency: USD Line Total: 0.00
0.00% Discount: 0.00
Freight 10 : 10.74
Duties 20 : 0.00
Special 30 : 0.00
Total Tax: 0.00
Total: 10.74

TherOx, Inc.
2400 Michelson Drive
Irvine, CA 92612-1310
United States of America

I N V O I C E

Invoice: IN1018 Revision:
Invoice Date: 10/07/03 Page:
Print Date: 12/27/04

Bill To: 00010004

Sold To: 00010004

Facials by Kelly
2461 Marian Ave.
Anaheim, CA 92804
United States of America

Facials by Kelly
2461 Marian Ave.
Anaheim, CA 92804
United States of America

Sales Order: SO10041
Order Date: 10/07/03
Salesperson(s):

Ship Date: 10/07/03
Purchase Order:
Ship To: 00010005
Ship Via:
BOL:
FOB Point: Shipping Point

Credit Terms: NET 0
Net Zero

Resale:
Remarks: Pay by Credit Card

Item Number	UM	Shipped	Backorder	Tax	Price	Extended Price
90100-0001	EA	0.5	0.0	no	540.00	270.00
Oxium, Night Cream						

Non-Taxable: 273.95
Taxable: 0.00
Tax Date: 10/07/03

Currency: USD

0.00%

Line Total:	270.00
Discount:	0.00
Freight 10 :	3.95
Duties 20 :	0.00
Special 30 :	0.00
Total Tax:	0.00
Total:	273.95

TherOx00763

TherOx, Inc.
2400 Michelson Drive
Irvine, CA 92612-1310
United States of America

I N V O I C E

Invoice: IN1019 Revision:
Invoice Date: 12/08/03 Page:
Print Date: 12/27/04

Bill To: 00010006

Sold To: 00010006

AROMATIQUE
250 W. FIRST ST. #12
CLAREMONT, CA 91711
United States of America

AROMATIQUE
250 W. FIRST ST. #12
CLAREMONT, CA 91711
United States of America

Sales Order: SO10043
Order Date: 12/08/03
Salesperson(s):
Credit Terms: COD
Cash on Delivery
Resale:
Remarks: Shipped FedEx Ground

Ship Date: 12/08/03
Purchase Order:
Ship To: 00010006
Ship Via: FedEx Ground
BOL:
FOB Point: Shipping Point

Item Number	UM	Shipped	Backorder Tax	Price	Extended Price
90100-0001	EA	1.0	0.0 no	540.00	540.00
Oxium, Night Cream					

Non-Taxable: 558.00	Currency: USD	Line Total:	540.00
Taxable: 0.00	0.00%	Discount:	0.00
Tax Date: 12/08/03	Freight 10 :		18.00
	Duties 20 :		0.00
	Special 30 :		0.00
	Total Tax:		0.00
	Total:		558.00

TherOx, Inc.
2400 Michelson Drive
Irvine, CA 92612-1310
United States of America

I N V O I C E

Invoice: IN1020 Revision:
Invoice Date: 01/09/04 Page:
Print Date: 12/27/04

Bill To: 00010004

Sold To: 00010004

Facials by Kelly
2461 Marian Ave.
Anaheim, CA 92804
United States of America

Facials by Kelly
2461 Marian Ave.
Anaheim, CA 92804
United States of America

Sales Order: SO10045
Order Date: 01/09/04
Salesperson(s):

Ship Date: 01/09/04
Purchase Order:
Ship To: 00010010
Ship Via: FedEx Ground
BOL:
FOB Point: Shipping Point

Credit Terms: NET 0
Net Zero

Resale:
Remarks: Credit Card 5121071726317963 exp. 04/06

Item Number	UM	Shipped	Backorder	Tax	Price	Extended Price
90100-0001	EA	0.5	0.0	no	540.00	270.00
Oxium, Night Cream						

Non-Taxable: 273.46
Taxable: 0.00
Tax Date: 01/09/04

Currency: USD
Line Total: 270.00
0.00% Discount: 0.00
Freight 10 : 3.46
Duties 20 : 0.00
Special 30 : 0.00
Total Tax: 0.00
Total: 273.46

TherOx, Inc.
2400 Michelson Drive
Irvine, CA 92612-1310
United States of America

I N V O I C E

Invoice: IN1021 Revision:
Invoice Date: 03/19/04 Page:
Print Date: 12/27/04

Bill To: 00010011

Sold To: 00010011

SC-Robert Sigal MD
1825 Samuel Morris
Reston, VA 20190
United States of America

SC-Robert Sigal MD
1825 Samuel Morris
Reston, VA 20190
United States of America

Sales Order: SO10050
Order Date: 03/17/04
Salesperson(s):

Ship Date: 03/17/04
Purchase Order:
Ship To: 00010011
Ship Via: Fed Ex
BOL:
FOB Point: Shipping Point

Credit Terms: NET 0
Net Zero

Resale:
Remarks: CC 4108 9300 0008 8998 exp 10/04

Item Number	UM	Shipped	Backorder Tax	Price	Extended Price
90100-0001	EA	0.5	0.0 no	540.00	270.00
Oxium, Night Cream					

Non-Taxable: 276.21	Currency: USD	Line Total:	270.00
Taxable: 0.00	0.00%	Discount:	0.00
Tax Date: 03/17/04	Freight 10 :		6.21
	Duties 20 :		0.00
	Special 30 :		0.00
	Total Tax:		0.00
	Total:		276.21

TherOx, Inc.
 2400 Michelson Drive
 Irvine, CA 92612-1310
 United States of America

I N V O I C E

Invoice: IN1025 Revision:
 Invoice Date: 04/16/04 Page:
 Print Date: 12/27/04

Bill To: 00010004

Sold To: 00010004

Facials by Kelly
 2461 Marian Ave.
 Anaheim, CA 92804
 United States of America

Facials by Kelly
 2461 Marian Ave.
 Anaheim, CA 92804
 United States of America

Sales Order: SO10052
 Order Date: 04/16/04
 Salesperson(s):

Ship Date: 04/16/04
 Purchase Order:
 Ship To: 00010010
 Ship Via: Drop Off
 BOL:
 FOB Point: Shipping Point

Credit Terms: NET 0
 Net Zero

Resale:
 Remarks: Amex 3727-1522-3342-000 exp 12/07

Item Number	UM	Shipped	Backorder	Tax	Price	Extended Price
90100-0001	EA	0.5	0.0	no	540.00	270.00
Oxium, Night Cream						

Non-Taxable: 270.00	Currency: USD	Line Total:	270.00
Taxable: 0.00	0.00%	Discount:	0.00
Tax Date: 04/16/04	Freight 10 :		0.00
	Duties 20 :		0.00
	Special 30 :		0.00
	Total Tax:		0.00
	Total:		270.00

TherOx, Inc.
 2400 Michelson Drive
 Irvine, CA 92612-1310
 United States of America

I N V O I C E

Invoice: IN1030 Revision:
 Invoice Date: 07/06/04 Page:
 Print Date: 12/27/04

Bill To: 00010004

Sold To: 00010004

Facials by Kelly
 2461 Marian Ave.
 Anaheim, CA 92804
 United States of America

Facials by Kelly
 2461 Marian Ave.
 Anaheim, CA 92804
 United States of America

Sales Order: SO10055
 Order Date: 07/06/04
 Salesperson(s):

Ship Date: 07/06/04
 Purchase Order:
 Ship To: 00010010
 Ship Via: Fed Ex Ground
 BOL:
 FOB Point: Shipping Point

Credit Terms: NET 0
 Net Zero

Resale:
 Remarks: Amex 3727 1522 3342 000 Exp 12/07

Item Number	UM	Shipped	Backorder	Tax	Price	Extended Price
90100-0001	EA	0.5	0.0	no	540.00	270.00
Oxium, Night Cream						

Non-Taxable: 273.53	Currency: USD	Line Total:	270.00
Taxable: 0.00	0.00%	Discount:	0.00
Tax Date: 07/06/04	Freight 10 :		3.53
	Duties 20 :		0.00
	Special 30 :		0.00
	Total Tax:		0.00
	Total:		273.53

TherOx, Inc.
2400 Michelson Drive
Irvine, CA 92612-1310
United States of America

I N V O I C E

Invoice: IN1031 Revision: :
Invoice Date: 07/06/04 Page: :
Print Date: 12/27/04

Bill To: 00010006

Sold To: 00010006

AROMATIQUE
250 W. FIRST ST. #12
CLAREMONT, CA 91711
United States of America

AROMATIQUE
250 W. FIRST ST. #12
CLAREMONT, CA 91711
United States of America

Sales Order: SO10056
Order Date: 07/06/04
Salesperson(s):

Ship Date: 07/06/04
Purchase Order:
Ship To: 00010006
Ship Via: Fed Ex Ground
BOL:
FOB Point: Shipping Point

Credit Terms: NET 0
Net Zero

Resale:
Remarks:

Item Number	UM	Shipped	Backorder	Tax	Price	Extended Price
90100-0001	EA	1.0	0.0	no	540.00	540.00
Oxium, Night Cream						

Non-Taxable: 551.14	Currency: USD	Line Total:	540.00
Taxable: 0.00	0.00%	Discount:	0.00
Tax Date: 07/06/04	Freight 10 :		11.14
	Duties 20 :		0.00
	Special 30 :		0.00
	Total Tax:		0.00
	Total:		551.14

TherOx00769



EXHIBIT
App's 15
12-19-06

OPP00024



OPP00028

MEDIA PLANNING

December 23, 2002

Ms. Suzanne Spahr
GlaxoSmithKline
1000 GSK Drive
Moon Township, PA 15108

RE: Oxy 2003 Revision #1 (\$7,450.0M)

Dear Suzanne:

Attached please find Revision #1 of the 2003 Oxy media plan for your review. This plan reflects the elimination of Radio, which funds additional Cable TV in the summer and additional Internet activity. Please note, this plan also reflects the incorporation of the Print Plan. The following outlines specific changes to the plan:

- ✓ Eliminated Network Radio activity (weeks 6/2 through 7/28) (-\$1,151.0M)
- ✓ Funds from above reinvested into additional Cable and Internet activity
 - Teen Cable to run at 35 grps/wk from 6/2 through 7/28 at 100% :15s (+\$791.9M)
 - Internet budget for the year has increased to \$859.0M (+\$359.0M)
 - Activity has been reflighted to include the months of April and September
- ✓ Print activity is flighted from May through October (P4CB, 1/3 P4CB) in the following publications:
 - CosmoGirl!
 - DC Comics
 - Elle Girl
 - Scholastic Teen (5 Network)
 - SI for Kids – Teen Select
 - Teen People
 - YM
- ✓ Print A4wk and Cume deliveries are 37/1.6/61 and 64/5.7/365, respectively
- ✓ Overall, A4wk and Cume deliveries drop to 73/3.0/217 and 96/16.4/1577 vs. 86/3.8/328 and 96/17.0/1631 in the Original Approved Plan (as a result of eliminating Radio)

As always, please call me at (212) 463-1047 with any questions or comments.

Regards,



Preeti Bhatt
Media Planner

Cc: GSK: K. Schade, D. Singer, T. Gallick, D. Sefer, C. Saltmar
MPG/Arnold: S. Waterman, M. Gordon, M. Walker, B. Silverstein, A. Morton, J. Post, P. Friedland

TRADE
SECRET/COMMERCIAL
SENSITIVE

MPG

110 Fifth Avenue, New York, NY 10011 - Tel.: 212 790-4800 - Fax: 212 463-1111
Amsterdam - Barcelona - Buenos Aires - Chicago - Lisboa - London - Los Angeles - Madrid - México, DF -
Miami - Milano - New York - Paris - Porto - San Francisco - Santiago, Chile - Bogotá, D.C. - Warszawa - Zürich

OPP00196

Oxy - 2005 Media Flowchart

REDACTED

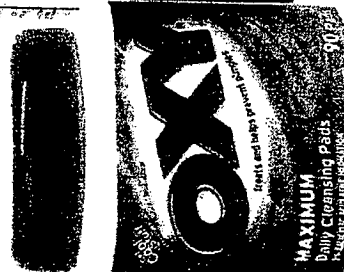
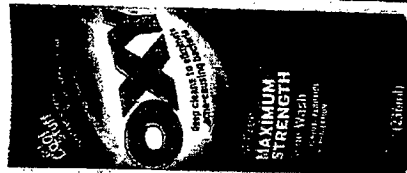
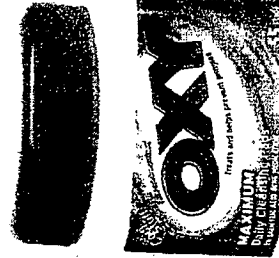
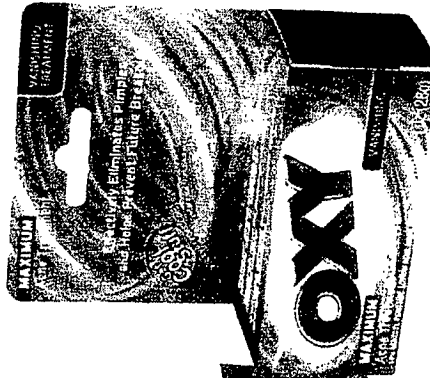
Campaign Duration - June to December 2005
Last update 7/13/2005

	June					July					August					September					October					November					December				
	5	12	19	26		3	10	17	24	31	7	14	21	28		4	11	18	25		2	9	16	23	30		6	13	20	27		4	11	18	25
DEW TOUR Louisville Denver Portland San Jose Orlando																																			
PRINT*																																			
Sports Illustrated for Kids																																			
Transworld - Ride BMX																																			
Transworld - Skateboarding																																			
Transworld - MotoCross																																			
MAD Magazine																																			
DC Comics																																			
Future Skateboarding Buyers Guide																																			
Future Snowboarding																																			
FSI News America																																			
Television*																																			
NBC - Dew Tour																																			
USA - Dew Tour																																			
MTV																																			
MTV 2																																			
Comedy Central																																			
TOTAL																																			

*Flighting for TV is as follows:

Dew Tour (NBC & USA) Mirra exclusively
MTV through 8/1, Mirra exclusively
MTV/Comedy rotac Water Skiing and Mirra 50/50 through 8/14
MTV/Comedy rotac Water Skiing and Cafeteria 50/50 - 8/15 to 9/11

OPP00019





OPP00028



Gary D. Krugman
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T 202.293.7060
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Toei Nishi Shimbashi Bldg. 4F
13-5 Nishi Shimbashi 1-Chome
Minato-Ku, Tokyo 105-0003
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www.sughrue.com

June 7, 2002
VIA FIRST CLASS MAIL

Margaret A. Kivinski
Therox, Inc.
2400 Michelson Drive
Irvine, California 92612-1310

Re: U.S. Trademark Application No.: 78/116,976
Mark: OXIUM
Our Ref: K-9166

Dear Ms. Kivinski:

This firm represents SmithKline Beecham Corporation ("SB") in connection with trademarks and related intellectual property law matters.

As you may know, SB has adopted, used and registered many trademarks which comprise or include the term OXY, either by itself, or together with another word or words, for acne medications, skin care preparations, skin wash, skin cleansers and related products. In this regard, SB is the owner of valid, subsisting United States Principal Register trademark registrations for the following marks, among others:

OXY	Registration No. 1,869,207	Issued December 27, 1994
OXY (Stylized)	Registration No. 1,873,555	Issued January 17, 1995
OXY SENSITIVE	Registration No. 1,912,223	Issued August 15, 1995
OXY PAD LIFTER	Registration No. 2,007,981	Issued October 15, 1996
OXY BALANCE	Registration No. 2,093,711	Issued September 15, 1996
OXY NIGHT WATCH	Registration No. 1,563,000	Issued October 31, 1989
OXY 10 WASH	Registration No. 1,314,264	Issued January 15, 1985
OXY 10	Registration No. 1,141,969	Issued December 2, 1980

Copies of the foregoing registrations are enclosed for your information.

Because of the long use, extensive promotion and recognition of the OXY marks by the purchasing public, SB's OXY marks have become famous, have come to be exclusively associated with skin care products originating from SB and have come to be extremely valuable assets of SB.

EXHIBIT

App's 16
12-19-06



Margaret A. Kivinski
June 7, 2002
Page 2 of 2

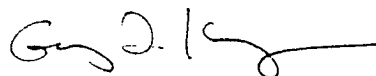
It has recently come to our attention that you have filed an application to register the mark OXIUM for goods described as oxygenated skin care preparations, namely, creams, masks, gels and lotions for the face, hands, feet and body. Because of the similarity between your client's mark and SB's various OXY marks and given the fact that the goods covered in your application are closely related to my client's goods of interest, we are concerned that your OXIUM mark is likely to cause confusion, mistake or deception as to source or sponsorship, thereby damaging SB.

Given the foregoing, the purpose of this letter is to request that you abandon the OXIUM application and agree to change over to another mark which does not include or comprise the term OXY, OXI or variations thereof, either by itself or together with another word or words. If you are willing to agree to the foregoing, I would be happy to prepare a simple straightforward agreement for your review.

While we would prefer to amicably resolve this matter as discussed above, SB must protect its valuable trademark rights which it has built up over the years and SB is prepared to take whatever action it deems appropriate in the event this matter is not quickly brought to a satisfactory conclusion. We note from your application that you have been using the mark for less than a year and we believe that changing over to another mark would not be burdensome at this early stage. In any event, it is our intention to oppose registration of your mark in the event the mark is published for opposition. Moreover, we reserve the right to take any and all necessary action regarding your use of the mark in connection with skincare products.

In view of the importance of this matter to my client, please let me hear back from you within fifteen days from the mailing date of this letter.

Very truly yours,


Gary D. Krugman

GDK/clb

Enclosures: Copies of SB's Registrations (8)

cc: Christopher Sidoti, Esq. (w/o enclosures)

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 06/06/2002 17:04:02 ET

Serial Number: 74485350

Registration Number: 1869207

Mark (words only): OXY

Current Status: Section 8 and 15 affidavits have been accepted and acknowledged.

Date of Status: 2001-03-08

Filing Date: 1994-02-01

Registration Date: 1994-12-27

Law Office Assigned: TMEO Law Office 11

CURRENT APPLICANT(S)/OWNER(S)

1. SmithKline Beecham Corporation

Address:

SmithKline Beecham Corporation
One Franklin Plaza
Philadelphia, PA 19101
United States

State or Country of Incorporation: Pennsylvania

Legal Entity Type: Corporation

GOODS AND/OR SERVICES

acne medication

International Class: 005

First Use Date: 19750300

First Use in Commerce Date: 19750300

Basis: 1(a)

ADDITIONAL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

2001-03-08 - Section 8 (6-year) accepted & Section 15 acknowledged

2000-10-19 - Section 8 (6-year) and Section 15 Filed

1994-12-27 - Registered - Principal Register

1994-10-04 - Published for opposition

1994-09-02 - Notice of publication

1994-06-20 - Approved for Pub - Principal Register (Initial exam)

1994-06-15 - Case file assigned to examining attorney

CONTACT INFORMATION

Correspondent (Owner)

CHRISTOPHER SIDOTI

SMITHKLINE BEECHAM CORPORATION

709 SWEDELAND ROAD

P.O. BOX 1539

KING OF PRUSSIA, PA 19406-0939

United States

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 06/06/2002 17:04:22 ET

Serial Number: 74485351

Registration Number: 1873555

Mark



(words only): OXY

Current Status: Section 8 and 15 affidavits have been accepted and acknowledged.

Date of Status: 2001-04-25

Filing Date: 1994-02-01

Registration Date: 1995-01-17

Law Office Assigned: TMEO Law Office 11

CURRENT APPLICANT(S)/OWNER(S)

1. SmithKline Beecham Corporation

Address:

SmithKline Beecham Corporation
One Franklin Plaza
Philadelphia, PA 19101
United States

State or Country of Incorporation: Pennsylvania

Legal Entity Type: Corporation

GOODS AND/OR SERVICES

acne medication

International Class: 005

First Use Date: 19910100

First Use in Commerce Date: 19910100

Basis: 1(a)

ADDITIONAL INFORMATION

Lining and Stippling: The mark is lined for the color pink.

Prior Registration Number(s):

941289
1083107
1141969
1293829
1314264
1549789
1563000
1795563

PROSECUTION HISTORY

2001-04-25 - Section 8 (6-year) accepted & Section 15 acknowledged

2001-01-02 - Section 8 (6-year) and Section 15 Filed

1995-01-17 - Registered - Principal Register

1994-10-25 - Published for opposition

1994-09-23 - Notice of publication

1994-06-20 - Approved for Pub - Principal Register (Initial exam)

1994-06-15 - Case file assigned to examining attorney

CONTACT INFORMATION

Correspondent (Owner)

CHRISTOPHER SIDOTI (Attorney of record)

CHRISTOPHER SIDOTI
SMITHKLINE BEECHAM CORPORATION
709 SWEDELAND ROAD
KING OF PRUSSIA, PA 19406
United States

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 06/06/2002 17:04:38 ET

Serial Number: 74485344

Registration Number: 1912223

Mark (words only): OXY SENSITIVE

Current Status: Registered.

Date of Status: 1995-08-15

Filing Date: 1994-02-01

Registration Date: 1995-08-15

Law Office Assigned: TMEO Law Office 11

CURRENT APPLICANT(S)/OWNER(S)

1. SmithKline Beecham Corporation

Address:

SmithKline Beecham Corporation
One Franklin Plaza
Philadelphia, PA 19101
United States

State or Country of Incorporation: Pennsylvania

Legal Entity Type: Corporation

GOODS AND/OR SERVICES

acne medication

International Class: 005

First Use Date: 19940500

First Use in Commerce Date: 19940500

Basis: 1(a)

ADDITIONAL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

1995-08-15 - Registered - Principal Register

1995-05-31 - Allowed for Registration - Principal Register (SOU accepted)

1995-04-19 - Statement of use processing complete

1995-04-19 - Extension 1 granted

1995-02-21 - Amendment to Use filed

1995-02-21 - Extension 1 filed

1995-01-10 - Notice of allowance - mailed

1994-10-18 - Published for opposition

1994-09-16 - Notice of publication

1994-06-20 - Approved for Pub - Principal Register (Initial exam)

1994-06-15 - Case file assigned to examining attorney

CONTACT INFORMATION

Correspondent (Owner)

Teresa M. Hechmer (Attorney of record)

TERESA M. HECHMER
SMITHKLINE BEECHAM CORPORATION
CORPORATE I.P.- TRADEMARKS, (UW2221)
709 SWEDELAND ROAD
KING OF PRUSSIA, PA 19406
United States

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 06/06/2002 17:04:51 ET

Serial Number: 74713501

Registration Number: 2007981

Mark (words only): OXY PAD LIFTER

Current Status: Registered.

Date of Status: 1996-10-15

Filing Date: 1995-08-10

Registration Date: 1996-10-15

Law Office Assigned: TMEG Law Office 105

CURRENT APPLICANT(S)/OWNER(S)

1. SmithKline Beecham Corporation

Address:

SmithKline Beecham Corporation
One Franklin Plaza
Philadelphia, PA 19101
United States

State or Country of Incorporation: Pennsylvania

Legal Entity Type: Corporation

GOODS AND/OR SERVICES

skin care preparations for the treatment of acne and related skin conditions

International Class: 005

First Use Date: 19951100

First Use in Commerce Date: 19951100

Basis: 1(a)

ADDITIONAL INFORMATION

Disclaimer: "PAD"

Prior Registration Number(s):

1293829

1549789

PROSECUTION HISTORY

1996-10-15 - Registered - Principal Register

1996-07-23 - Published for opposition

1996-06-21 - Notice of publication

1996-05-20 - Approved for Pub - Principal Register (Initial exam)

1996-05-20 - Amendment to Use approved

1996-03-20 - Communication received from applicant

1996-05-15 - Amendment to use processing complete

1996-03-20 - Amendment to Use filed

1996-02-08 - Non-final action mailed

1996-01-29 - Case file assigned to examining attorney

CONTACT INFORMATION

Correspondent (Owner)

Christopher A. Sidoti (Attorney of record)

CHRISTOPHER A. SIDOTI
SMITHKLINE BEECHAM CORPORATION
709 SWEDELAND ROAD-UW2221
KING OF PRUSSIA, PA 19406
United States

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 06/06/2002 17:05:02 ET

Serial Number: 75101915

Registration Number: 2093711

Mark (words only): OXY BALANCE

Current Status: Registered.

Date of Status: 1997-09-02

Filing Date: 1996-05-09

Registration Date: 1997-09-02

Law Office Assigned: TMEG Law Office 105

CURRENT APPLICANT(S)/OWNER(S)

1. SmithKline Beecham Corporation

Address:

SmithKline Beecham Corporation
One Franklin Plaza, P.O. Box 7929
Philadelphia, PA 19101
United States

State or Country of Incorporation: Pennsylvania

Legal Entity Type: Corporation

GOODS AND/OR SERVICES

acne medication

International Class: 005

First Use Date: 19970324

First Use in Commerce Date: 19970324

Basis: 1(a)

ADDITIONAL INFORMATION

Prior Registration Number(s):

1869207

1873555

PROSECUTION HISTORY

1997-09-02 - Registered - Principal Register
1997-07-08 - Allowed for Registration - Principal Register (SOU accepted)
1997-07-07 - Case file assigned to examining attorney
1997-07-02 - Statement of use processing complete
1997-07-02 - Extension 1 granted
1997-04-29 - Extension 1 filed
1997-04-29 - Amendment to Use filed
1997-01-28 - Notice of allowance - mailed
1996-11-05 - Published for opposition
1996-10-04 - Notice of publication
1996-08-19 - Approved for Pub - Principal Register (Initial exam)
1996-08-07 - Case file assigned to examining attorney

CONTACT INFORMATION

Correspondent (Owner)

Christopher A. Sidoti (Attorney of record)

CHRISTOPHER A. SIDOTI
SMITHKLINE BEECHAM CORPORATION
CORP. INTELLECTUAL PROP. (TRADEMARKS)-US
709 SWEDELAND ROAD - UW2221
KING OF PRUSSIA, PA 19406
United States

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 06/06/2002 17:05:13 ET

Serial Number: 73788025

Registration Number: 1563000

Mark

oxy NIGHT WATC

(words only): OXY NIGHT WATCH

Current Status: Section 8 and 15 affidavits have been accepted and acknowledged.

Date of Status: 1996-03-20

Filing Date: 1989-03-20

Registration Date: 1989-10-31

Law Office Assigned: TMEO Law Office # 7

CURRENT APPLICANT(S)/OWNER(S)

1. SMITHKLINE BEECHAM CORPORATION

Address:

SMITHKLINE BEECHAM CORPORATION
P.O. BOX 7929 ONE FRANKLING PLAZA
PHILADELPHIA, PA 19101

United States

State or Country of Incorporation: Pennsylvania

Legal Entity Type: Corporation

GOODS AND/OR SERVICES

MEDICATION FOR THE TREATMENT OF ACNE

International Class: 005

First Use Date: 19890203

First Use in Commerce Date: 19890203

Basis: 1(a)

ADDITIONAL INFORMATION

Prior Registration Number(s):

941289
1083107
1141969
1266098
1293132
1293829
1314264

PROSECUTION HISTORY

1996-03-20 - Section 8 (6-year) accepted & Section 15 acknowledged

1995-07-14 - Section 8 (6-year) and Section 15 Filed

1989-10-31 - Registered - Principal Register

1989-08-08 - Published for opposition

1989-07-09 - Notice of publication

1989-05-15 - Approved for Pub - Principal Register (Initial exam)

CONTACT INFORMATION

Correspondent (Owner)

CHRISTOPHER A. SIDOTI (Attorney of record)

CHRISTOPHER A. SIDOTI
SMITHKLINE BEECHAM PHARMACEUTICALS ET AL
709 SWEDELAND ROAD
KING OF PRUSSIA, PA 19406
United States

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This page was generated by the TARR system on 06/06/2002 17:05:23 ET

Serial Number: 73457290

Registration Number: 1314264

Mark



(words only): OXY 10 WASH

Current Status: Section 8 and 15 affidavits have been accepted and acknowledged.

Date of Status: 1991-03-14

Filing Date: 1983-12-15

Registration Date: 1985-01-15

Law Office Assigned: TMEO Law Office # 7

CURRENT APPLICANT(S)/OWNER(S)

1. Beecham Inc.

Address:

Beecham Inc.
303 S. Broadway
Tarrytown, NY 10591
United States

State or Country of Incorporation: Tennessee

Legal Entity Type: Corporation

GOODS AND/OR SERVICES

Antibacterial Skin Wash

International Class: 005

First Use Date: 19790800

First Use in Commerce Date: 19790800

Basis: 1(a)

ADDITIONAL INFORMATION

Disclaimer: No claim is made to the exclusive right to use "Wash", apart from the mark as shown.

Prior Registration Number(s):

779164

1239132

PROSECUTION HISTORY

1991-03-14 - Section 8 (6-year) accepted & Section 15 acknowledged

1990-11-13 - Section 8 (6-year) and Section 15 Filed

1985-01-15 - Registered - Principal Register

1984-11-06 - Published for opposition

1984-10-19 - Notice of publication

1984-07-26 - Approved for Pub - Principal Register (Initial exam)

1984-07-02 - Communication received from applicant

1984-05-31 - Examiner's amendment mailed

1984-05-21 - Case file assigned to examining attorney

CONTACT INFORMATION

Correspondent (Owner)

Jay H. Begler (Attorney of record)

NANCY WOHLFORD

ONE FRANKLIN PLAZA

P. O. BOX 7929

PHILADELPHIA, PA 19101-7929

United States

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 06/06/2002 17:05:35 ET

Serial Number: 73195774

Registration Number: 1141969

Mark (words only): OXY 10

Current Status: This registration has been renewed.

Date of Status: 2001-03-13

Filing Date: 1978-12-06

Registration Date: 1980-12-02

Law Office Assigned: (NOT AVAILABLE)

CURRENT APPLICANT(S)/OWNER(S)

1. SMITHKLINE BEEHAM CORPORATION

Address:

SMITHKLINE BEEHAM CORPORATION

ONE FRANKLIN PLAZA

PHILADELPHIA, PA 19101

United States

State or Country of Incorporation: Pennsylvania

Legal Entity Type: Corporation

GOODS AND/OR SERVICES

Medication for Treatment of Acne

International Class: 005

First Use Date: 19771019

First Use in Commerce Date: 19771019

Basis: 1(a)

ADDITIONAL INFORMATION

Disclaimer: Applicant further states no claim is made to exclusive use of the numeral "10" apart from the mark as shown in the drawing.

Prior Registration Number(s):

9412890

PROSECUTION HISTORY

2001-03-13 - Registration renewed - 10 year

2001-03-13 - Section 8 (10-year) accepted/ Section 9 granted

2000-10-19 - Combined Section 8 (10-year)/Section 9 filed

1986-12-02 - Section 8 (6-year) accepted & Section 15 acknowledged

1986-10-30 - Response received for Post Registration action

1985-11-18 - Post Registration action mailed Section 8 & 15

1985-08-19 - Section 8 (6-year) and Section 15 Filed

1980-12-02 - Registered - Principal Register

CONTACT INFORMATION

Correspondent (Owner)

CHRISTOPHER SIDOTI (Attorney of record)

CHRISTOPHER SIDOTI
SMITHKLINE BEECHAM CORPORATION
709 SWEDELAND RD.
KING OF PRUSSIA, PA 19406
United States
